Developing the right to education in the context of regional African human rights law: protecting children with non-heteronormative sexual orientations, non-binary gender identities or gender expressions

by

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Declaration

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Charlene Kreuser
11 December 2020

Summary

At the centre of this dissertation is the denial of a fundamental right based on personal attributes. This denial is due to preconceptions regarding what people should be, the behaviours they should adopt, and the romantic relationships that they should form. The question that the dissertation addresses is part of a larger issue of how heteronormative conceptions of sexual orientation, gender identities and gender expression shape the law and its institutions, excluding persons who do not fit this conceptual approach.

The right to education is guaranteed under international and regional human rights law. It is key to promoting the full and harmonious development of children into adults who can contribute to the development of their communities. Despite this, learners with non-heteronormative sexual orientations and non-binary gender identities or gender expressions ("SOGIE") face discrimination and marginalisation in the school environment, preventing them from fully enjoying this right.

On the African continent, two factors exacerbate the discrimination experienced by these learners. Firstly, the perception that non-heteronormative SOGIE are un-African. Secondly, non-heteronormative SOGIE are not explicitly listed as prohibited grounds of discrimination under the African Charter on Human and Peoples' Rights ("ACHPR"), the African Charter on the Rights and Welfare of the Child ("ACRWC"), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol").

Against this backdrop, this dissertation explores the perception that non-heteronormative SOGIE are un-African, and utilises queer theory and queer legal theory as tools to assist in unpacking and re-thinking heteronormativity as site of violence. This dissertation further utilises a teleological approach to the interpretation of treaties to develop the right to education of children with non-heteronormative SOGIE under the ACHPR, the ACRWC, and the Maputo Protocol through the lens of the rights to human dignity, non-discrimination, equal protection of the law, and the principle of the best interests of the child. In this regard, guidance is drawn from the interpretation of these rights by the international, European, and inter-American human rights bodies.

Although the current interpretation of rights to human dignity, non-discrimination, equal protection of the law, and the best interests of the child under the African human rights system does not provide adequate protection to children with non-heteronormative SOGIE in education, it is shown that these rights can be purposefully interpreted to provide a framework for the protection of learners with non-heteronormative SOGIE.

Opsomming

Hierdie proefskrif handel oor die ontkenning van 'n fundamentele reg gebaseer op persoonlike eienskappe. Die ontkenning is te wyte aan vooroordele oor wat mense moet wees, die gedrag wat hulle moet aanneem en die romantiese verhoudings wat hulle moet vorm. Die vraag wat die proefskrif behandel is deel van 'n groter vraagstuk oor hoe heteronormatiewe opvattings van seksuele oriëntasie, geslagsidentiteite en geslagsuitdrukking die wet en sy instellings vorm, ter uitsluiting van persone wat nie by hierdie konseptuele benadering inpas nie.

Die reg op onderwys word gewaarborg onder die internasionale en streeksmenseregte verdrae. Dit is die sleutel tot die bevordering van die volle en harmonieuse ontwikkeling van kinders tot volwassenes wat kan bydra tot die ontwikkeling van hul gemeenskappe. Ten spyte hiervan kom leerders met nie-heteronormatiewe seksuele oriëntasies en nie-binêre geslagsidentiteite of geslagsuitinge ("SOGIE") voor diskriminasie en marginalisering in die skoolomgewing te staan, wat hulle verhoed om hierdie reg ten volle te benut.

Op die vasteland van Afrika vererger twee faktore die diskriminasie wat hierdie leerders ervaar. Eerstens bestaan daar ‘n indruk dat nie-heteronormatiewe SOGIE nie hoort op die Afrika kontinent nie; dit is ingevoer deur kolonialisering. Tweedens word nie-heteronormatiewe SOGIE nie eksplisiet as verbode gronde van diskriminasie beskou onder die Afrika Handves oor die Menseregte en Volkeregte (“ACHPR”), die Afrika Handves vir die Regte en Welsyn van die Kind (“ACRWC”) en die Protokol by die Afrika Handves oor die Regte van Mense en Volke oor die Regte van Vroue in Afrika (“Maputo Protocol”).

Teen hierdie agtergrond ondersoek die proefskrif die indruk dat nie-heteronormatiewe SOGIE nie hoort op die Afrika kontinent nie, en word queer-teorie en queer-regsteorie as hulpmiddels gebruik om heteronormatiwiteit as plek van geweld te heroorweeg. In hierdie proefskrif word daar verder gebruik gemaak van 'n teleologiese benadering tot die interpretasie van verdrae om die reg op onderwys van kinders met nie-heteronormatiewe SOGIE onder die ACHPR, die ACRWC en die Maputo-protokol te ontwikkel. Dit word gedoen deur middel van die regte op menswaardigheid, nie-diskriminasie, gelyke beskerming van die wet, en die beginsel van die beste belang van die kind. In hierdie verband word leiding getrek uit die interpretasie van hierdie regte deur die internasionale, Europese en inter-Amerikaanse menseregte-liggame.

Alhoewel die huidige interpretasie van regte op menswaardigheid, nie-diskriminasie, gelyke beskerming van die wet, en die beste belang van die kind onder die Afrika menseregtestelsel nie voldoende beskerming bied aan kinders met nie-heteronormatiewe SOGIE in die onderwys nie, het hierdie proefskrif bevestig dat hierdie regte doelgerig geïnterpreteer kan word om 'n raamwerk te bied vir die beskerming van leerders met nie-heteronormatiewe SOGIE.

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Abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention of Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ADRDM	American Declaration on the Rights and Duties of Man
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
AU	African Union
AYC	African Youth Charter
CECR	Committee on Economic, Social and Cultural Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination Against Women
Collective Complaints Protocol	Additional Protocol to the European Social Charter Providing for a System of Collective Complaints
Convention of Belém do Pará	Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECmHR	European Commission of Human Rights
ECOSOC	Economic and Social Council
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
ESC(r)	Revised European Social Charter
Harvard Draft	Harvard Draft Convention on the Law of Treaties
HRC	Human Rights Committee

Human Rights Council	United Nations Human Rights Council
IACmHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
Independent Expert	Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
Non-heteronormative SOGIE	Non-heteronormative sexual orientations or non-binary gender identities or gender expressions
OAS	Organisation of American States
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner of Human Rights
Protocol of San Salvador	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights
QLT	Queer legal theory
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Charter	Charter of the United Nations
YP	Yogyakarta Principles
YP+10	Yogyakarta Principles plus 10

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1 Introduction

1 1 Background to the study and research problem

This dissertation aims to establish a purposive interpretation of the right to education under the African Charter on Human and Peoples' Rights ("ACHPR"),[1] the African Charter on the Rights and Welfare of the Child ("ACRWC"),[2] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol")[3] that protects children with non-heteronormative sexual orientations or non-binary gender identities or gender expressions ("non-heteronormative SOGIE"). Therefore, it focuses on the right to education of children with non-heteronormative SOGIE under the ACRWC, read together with the ACHPR and Maputo Protocol. The research departs from the primary assumption that non-heteronormative SOGIE rights are protected under African regional human rights law because all persons, due to their inherent dignity, are equally entitled to the rights enshrined under the ACHPR, the ACRWC, and the Maputo Protocol, including the right to education. This research furthermore aims to present a legal theory and a related methodology that assist in analysing the multifaceted vulnerabilities of children with non-heteronormative SOGIE.

Non-heteronormative SOGIE refers to all identities and expressions that fall outside the heterosexual norm. For purposes of this research, non-heteronormative SOGIE includes lesbian, gay, bisexual, transgender, and intersex persons.[4] However, it is not limited to these groups, embracing anyone who identifies as queer.[5] In other words, persons with non-heteronormative SOGIE do not fit the expected romantic coupling of a biological man and woman who are also comfortable in complying with certain prescribed gendered behaviour.[6] Because persons with non-heteronormative SOGIE do not conform to expected sex, gender, and sexual orientation-related behaviours, they are often vulnerable to violence and

[1] (Adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 (1982).
[2] (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49 (1990).
[3] (adopted 11 July 2003, entered into force 25 November 2005) OAU Doc. CAB/LEG/66.6 (2003).
[4] African Commission, IACmHR, UN "Ending violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission of Human and Peoples' Rights, Inter-America Commission on Human Rights and United Nations" (2016) *PULP* 1-2; Preamble to the Yogyakarta Principles "Principles on the application of international human rights law in relation to sexual orientation and gender identity" (11-2006) <http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf > (accessed 22-11-2020).
[5] LR Kepros "Queer Theory: Weed or Seed in the Garden of Legal Theory" (1999-2000) 9 *Law and Sexuality Rev Lesbian and Gay Legal Issues* 279 282; GA Yep "Queer Theory" in SW Littlejohn & KA Foss in *Encyclopedia of Communication Theory* (2009) 817 818.
[6] F Valdes "Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society" (1995) 83 *Cal L Rev* 1 15.

discrimination. This, as further argued in this research, is exacerbated in states where non-heteronormative SOGIE are not legally recognised.[7]

The protection of non-heteronormative SOGIE on the African continent is a complex matter. From a regional, legal perspective, Article 2 of the ACHPR, Article 3 of the ACRWC, and Article 1(f) of the Maputo Protocol do not explicitly list non-heteronormative SOGIE (e.g. sexual orientation, gender identity or gender expression) as prohibited grounds of discrimination. Moreover, non-heteronormative sexual orientations and non-binary gender identities or gender expressions are often viewed as an illness, brought from Europe by the colonisers of the continent. As such, it is often viewed as un-African.[8] This assumption prevails despite various accounts illustrating that non-heteronormative SOGIE was accepted in large parts of Africa before the arrival of colonialists and that the colonisers were responsible for the criminalisation of sexual conduct other than for the purpose of procreation.[9] In light hereof, Vollmer highlights an argument that is habitually presented within this context: because non-heteronormative SOGIE are un-African, individuals expressing non-heteronormative SOGIE are not carriers of human rights and, therefore, their rights are not protected under African human rights treaties.[10]

The assumption of the un-African-ness of non-heteronormative SOGIE arguably exacerbates violence and discrimination against children with non-heteronormative SOGIE. However, few studies have been conducted on the prevalence of violence perpetrated specifically against learners based on their SOGIE on the African continent.[11] In Namibia, a qualitative study focused on the experiences of self-identified homosexual learners in secondary schools.[12] The study reported accounts of learners being bullied and provoked to

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[7] African Commission, IACmHR, UN (2016) 15-16.

[8] AM Ibrahim (2015) "LGBT rights in Africa and the discursive role of international human rights law" (2015) 15 *AHRLJ* 263 265; ST Eborah "Africanising human rights in the 21st Century: Gay rights, African values and the dilemma of the African legislator" (2012) 1 *IHRLR* 110 115; S Tamale "Researching and theorising sexualities in Africa" in S Tamale (ed) *African Sexualities: A Reader* (2011) 11; J Bennett "Subversion and resistance: Activist initiatives" in S Tamale (ed) *African Sexualities: A Reader* (2011) 77 81.

[9] Eborah (2012) *IHRLR* 116-117; Ibrahim (2015) *AHRLJ* 267-269.

[10] DT Vollmer *Queer families: An analysis of non-heteronormative family rights under the African human rights system* LLD dissertation, Stellenbosch University (2017) 262.

[11] In contrast, there is more research available on the violence and discrimination experienced by children in schools in European countries and the United States. See, for example: R R Thoreson *"Like walking through a hailstorm" Discrimination against LGBT youth in US Schools* (2016); Lithuanian Gay League *Homophobic bullying in Lithuanian schools: survey results and recommendations* (2015); E Formby *The impact of homophobic and transphobic bullying on education and employment: A European survey* (2013); A Guasp *The school report: The experiences of gay young people in Britain's schools in 2012* (2012); P Gordon *Review of Homophobic Bullying in Educational Institutions* (2012); A W Brown & M Bochenek *Hatred in the Hallways: Violence and discrimination against lesbian, gay, bisexual, and transgender students in U.S. schools* (2001).

[12] Brown (2017) *African Identities* 339.

fight with their peers: "if you are man enough fight with me"; and of teachers refusing homosexual learners' entrance to their classrooms. [13] One student reported being called out in front of the school assembly:

> "They [teachers] would call me from the school assembly and ask all the learners if they see a boy or a girl. Obviously, the learners reply it is a boy. The teacher would then ask me why I want to turn myself into a girl. I would tell her that I am not turning myself into a girl, I am born as a girl. I will then be suspended for being disrespectful".[14]

In Nigeria, qualitative research was conducted on homophobic bullying in Nigerian schools, with specific focus on the experiences of lesbian, gay, bisexual, transgender, and queer university students.[15] According to the research, the prevalence of homophobic bullying was connected to society's disapproval of homosexuality.[16] Students reported being threatened, subjected to physical violence and name-calling from their peers. However, the students indicated that this was inevitable and preferable to being suspended or expelled.[17]

In South Africa, research conducted on the experiences of homophobia among queer learners in a township school reported that marginalisation of, and discrimination against, queer learners came across through the use of language and instilment of fear. In terms of the former, learners reported the use of terms such as 'faggot' (English), 'moffie' (Afrikaans) or 'isatabane' (isiZulu) in reference to homosexual students.[18] Thus, language was a way in which homophobia and heterosexism were entrenched.[19] This was also seen in the cautioning of girls against being tomboyish or expressing themselves as boys. This is both linked to what is considered as the feminine behaviour girls should strive towards, as well as how adopting behaviour that is ascribed to the opposite sex is "seen as one of the steps in the process of becoming queer".[20] In terms of the use of fear to maintain heterosexism, the research included

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[13] 344-345.
[14] 344.
[15] Okanlawon (2017) *Journal of LGBT Youth* 51. Because little data is available on homophobia and transphobia in educational settings, it must be assumed that the experiences of LGBTQ university students will be similar to those of schoolchildren.
[16] 51.
[17] 57-58.
[18] T Msibi "'I'm used to it now': experiences of homophobia among queer youth in South African township schools" (2012) 24 *Gender and Education* 515 523; D Bhana "Ruled by hetero-norms? Raising some moral questions for teachers in South Africa" (2014) 43 *Journal of Moral Education* 362 369.
[19] G M Herek "The psychology of sexual prejudice" (2000) 9 *Current Directions in Psychological Science* (2000) 19 19. See also: E P Cramer *Addressing Homophobia and Heterosexism on College Campuses* (2014) 2. Herek defines 'heterosexism' as "an ideological system that denies, denigrates, and stigmatizes any nonheterosexual form of behavior, identity, relationship, or community".
[20] Msibi (2012) *Gender and Education* 523.

accounts of teachers "spreading the idea that homosexuality [is] contagious" and that 'straight' learners are therefore "in danger of being infected by queer learners".[21] Thus, using homophobic language and instilling fear both contributed to the othering of homosexual learners.

There is a lack of research on the African continent regarding the experiences of transgender learners in schools. The unreported judgment of the Equality Court of South Africa in *Mphela v Manamela and Limpopo Department of Education*[22] illustrates that transgender learners are subject to similar discrimination and victimisation as homosexual learners. The claimant, Mphela, was born male, but identified and expressed herself as female: she wore the girls' school uniform and used the girls' bathroom. Mphela testified that she was subject to verbal and physical abuse at the hand of the principal. Her allegations include that the principal beat her with a stick, blocked her from entering classrooms, and humiliated her in front of her peers. As a result, Mphela did not complete her education as the school did not provide a safe environment, conducive to learning.[23]

Even though only limited research is available, these examples show that children with non-heteronormative SOGIE are often subject to discrimination and degrading treatment in schools as a result of religious or cultural convictions. Consequently, an unaccepting school environment prevents children with non-heteronormative SOGIE from taking advantage of all the benefits that stem from the right to education to the same degree as other children.

The realisation of socio-economic rights is integral to the right to a dignified life.[24] In particular, the right to education is key to promoting the full and harmonious development of the child into adults who can contribute to the development of their communities.[25] The ACHPR, the ACRWC, and the Maputo Protocol guarantee *all* African children an *equal* right to education.[26] The right to education does not refer to the mere formal access to education. Rather, the school environment should be such that it enables each child to benefit equally from education. However, considering the violence and discrimination that children with non-heteronormative SOGIE face in many schools, it is unlikely that they can fully enjoy their right

[21] 524.
[22] (2017) (unreported case), Seshego Equality Court.
[23] Summary of evidence: MP Nare (2017).
[24] M Ssenyonjo "Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 years since the adoption of the African Charter" (2011) 29 *NQHR* 358 359.
[25] KD Beiter *The Protection of the Right to Education by International Law* (2005) 470-471 P Arajärvi "Article 26" in A Eide, G Alfredsson, G Melander, LA Rehof & A Rosas (eds) *The Universal Declaration of Human Rights: A Commentary* (1992) 409.
[26] Article 17(1) of the ACHPR; Art 11(1) and (3) of the ACRWC; Art 12 of the Maputo Protocol.

to education. Moreover, any form of violence against children negatively affects their development, thereby infringing on their right to special protection and to have their best interests considered in all matters concerning them. As such, states that do not protect children with non-heteronormative SOGIE against discrimination in schools and that do not take steps to address it, violate, as further argued in this research, the obligations imposed by the ACHPR, the ACRWC, and the Maputo Protocol to respect, protect, promote, and ensure the rights enshrined therein without discrimination.

1 2 Research questions and hypotheses

The primary research question that this dissertation seeks to address is whether the right to education, as it is formulated in the ACRWC read together with the ACHPR and Maputo Protocol enables equal access to, and enjoyment of, education of children with non-heteronormative SOGIE. The secondary research questions, considered to fully engage with the primary research question, are:

(i) How do African conceptions of SOGIE in terms of traditional cultural and religious norms inform the current interpretation of the African Charter, the ACRWC and the Maputo Protocol?

(ii) Can a teleological approach to the interpretation of the ACHPR, ACRWC and the Maputo Protocol facilitate the development of the right to education of children with non-heteronormative and non-binary SOGIE through the lens of the rights to human dignity, non-discrimination, equal protection of the law, and the principle of the best interests of the child?

(iii) Is it possible to use a teleological approach that not only considers the background, Preamble, annexures and provisions of the instruments, but that is informed by, for example, the Yogyakarta Principles ("YP")[27] and the Yogyakarta Principles plus 10 ("YP+10")[28], and that considers international law and the findings of other regional human rights systems?

[27] Yogyakarta Principles "Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity" (03-2007) *yogyakartapinciples.org* <http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf> (accessed 22-22-2020).

[28] Yogyakarta Principles plus 10 "Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles" (11-2017) *yogyakartaprinciples.org* <http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf> (accessed 22-11-2020).

Based on the above, the research departs from the following primary, two-pronged, hypothesis:

(i) The current interpretation of rights to human dignity, non-discrimination, equal protection of the law, and the best interests of the child under the African human rights system does not provide adequate protection to children with non-heteronormative and non-binary SOGIE in education; however

(ii) These rights can be purposefully interpreted to provide a framework for the protection of SOGIE rights in education.

The following secondary assumptions further guide the research. First, the ACHPR, the ACRWC, and the Maputo Protocol protect the right to education of all children. However, given the experiences of children with non-heteronormative SOGIE, these instruments do not afford the right to education of children with non-heteronormative SOGIE on equal terms as children who express themselves within the existing gender binaries. Second, these instruments are formulated in broad terms to provide for the different national legal systems and traditional, cultural and religious values of the states in a region. Its broad formulation is ultimately aimed at promoting its signing and ratification. Third, as a result, states are not given detailed instructions as to what the protection of the rights guaranteed require: it is the sovereign state's prerogative to govern over its people and determine its policies, sometimes to the detriment of vulnerable groups.

1 3 Theory and methodology

1 3 1 Queer theory, queer legal theory, and African conceptions of SOGIE

At the core of the primary research question lies the heteronormative and non-heteronormative divide and how cultural and societal conceptions of sex, gender, and sexual orientation influence how individuals are viewed and treated. These conceptions ultimately influence the formulation, interpretation and application of regional human rights law instruments such as the ACRWC, ACHPR and the Maputo Protocol.

Queer theory was chosen as the theoretical framework of this dissertation for its inclusivity. It seeks to address the criticism of the homophile-, gay and lesbian liberationist- and lesbian feminist movements, being that it elevated one identity above another and was, therefore, exclusionary.[29] Queer theory includes any person who identifies within the framework of non-

[29] P de Vos "Gay and Lesbian Legal Theory" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 328 343; Yep "Queer Theory" in *Encyclopedia of Communication Theory* 817.

heteronormative sexual orientations or non-binary gender identities or gender expressions.[30] As such, it provides a framework within which it is possible to unpack how the conflation of sex, gender, and sexual orientation has culminated in the notion that biological men must be masculine and attracted to biological women who must be feminine and attracted to [biological] men.[31]

In this context, the research also explores the impact of colonialist depictions of Africans as sexual spectacles and the introduction of the Christian faith on the ingraining of Victorian-age ideas about sex, gender, and sexualities into African cultures.[32] This has resulted in a claim from most modern African states that non-heteronormative SOGIE are un-African and a white phenomenon, based on the assumptions that black identities are heterosexual and that racial and sexual identities are not comparable.[33] However, accounts of the existence of diverse understandings and acceptance of what is now defined as non-heteronormative SOGIE in pre-colonial Africa are also unpacked.[34] In this regard, queer theory facilitates the exploration and deconstruction of African conceptions of non-heteronormative SOGIE.

Together with queer theory, the research furthermore utilises intersectionality, allowing consideration of how, for example, sex, gender, sexual orientation, and age can exacerbate discrimination.[35] Because the dissertation focuses on the right to education of children, the discrimination against children based on their non-heteronormative SOGIE necessarily intersects with discrimination based on age.

Finally, and perhaps most importantly, queer theory, and intersectionality are framed by queer legal theory ("QLT"). The purpose of this layered theoretical approach is to create an informed understanding of the challenges faced by persons with diverse SOGIE and to illustrate how the establishment of heteronormative ideals permeate our entire existence and have culminated in a site of violence that disregards identities and behaviours that fall outside heteronormative norms.

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[30] Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 282.
[31] Valdes (1995) *Cal L Rev* 42.
[32] Bennett "Subversion and resistance: activist initiatives" in *African Sexualities: A Reader* 81; Tamale "Researching and theorising sexualities in Africa" in *African Sexualities: A Reader* 15-16.
[33] Eborah (2012) *IHRLR* 115.
[34] AM Ibrahim "LGBT rights in Africa and the discursive role of international human rights law" (2015) 15 *AHRLJ* 263 268.
[35] Valdes (1995) *Cal L Rev* 372.

1 3 2 A comparative, reform-oriented, legal methodology

A pure doctrinal methodology was considered too constricting for the purposes of this research. Instead, existing human rights law must, in line with the theoretical approach, be viewed through the lens of universality to afford children with non-heteronormative SOGIE the right to education. Therefore, a reform-oriented perspective is relevant. A reform-oriented perspective supplements the traditional legal doctrinal approach with other methods of research to address *lacunas* in the law. According to the Pearce Committee, reform-oriented research refers to "[r]esearch which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting".[36] Thus, a reform-oriented approach enables researchers to not only consider the law as it is, but also the law as it could or should be.[37] The non-doctrinal method applied in this research is the teleological interpretation of the ACHPR, ACRWC and the Maputo Protocol enabling a comparison of different sources of human rights law and accounting for the principles of universality and the best interests of the child.

A reform-oriented approach is often utilised within the scope of doctrinal research. This means that despite considering results that stem from non-doctrinal research, legal researchers do not often engage in non-doctrinal research themselves.[38] Under 1 1, limited results from psychological and educational studies conducted on the African continent was considered to provide some context to the research at hand. These results are valuable as it illustrates the experienced of learners with non-heteronormative SOGIE in schools in the African region, albeit not being the central theme of the research.

A comparative perspective between international, European, inter-American, and African human rights law further complements the research. Comparative legal research is valuable for cultivating awareness of the different ways in which legal or social issues are addressed in various systems.[39] Through this, comparative legal research also provides insight into how our perceptions and intuitions shape our understanding of the law.[40] Comparative legal research necessarily requires that the researcher expand their knowledge, considering diverse solutions

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[36] D Pearce, E Campbell & D Harding ('Pearce Committee') *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) quoted in Hutchinson & Duncan (2012) *Deakin LR* 101.
[37] Hutchinson (2015) *ELR* 131.
[38] 130.
[39] EJ Eberle "The method and role of comparative law" (2009) 8 *Global Stud L Rev* 451 471; R Leckey "Review of comparative law" (2017) 26 *Social & Legal Studies* 3 14; M van Hoecke & M Warrington "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" (1998) 47 *Int'l & Comp LQ* 495 497.
[40] Eberle (2009) *Wash U Global Stud L Rev* 455 471.

to similar problems.[41] In this regard, Örücü discusses the functional-institutional and problem-solving approaches. In terms of the functional-institutional approach, the question is whether there is an "institution in system B [that] performs an equivalent function to the one under survey in system A".[42] On the other hand, the problem-solving approach asks how "a specific social or legal problem, encountered both in society A and society B is resolved".[43] The approach to determining the comparability of legal systems, therefore, relies on the similarity of the legal or social problems or the existence of a system addressing this problem.

Frankenberg further draws attention to the "versatility and universality" of comparative legal research.[44] This is in line with the increasing interdependence between regions and the spreading of ideas through globalisation. Peters and Schwenke argue that, as a result of globalisation, "different legal systems and different cultures are confronted with each other and must interact".[45] According to Muir Watt, "globalization brings heightened exchange in certain fields".[46] Human rights are one such field, with the international human rights system resulting in heightened interaction between nations and regions through the United Nations ("UN"), and other international and regional human rights bodies.[47] As a result, it is becoming increasingly necessary to move beyond only comparing nation states, to also compare regional systems, considering the place of these systems in the broader international sphere.

The success of comparative legal research is largely dependent on the comparability of the systems concerned.[48] There are four grounds on which the international, European, inter-American, and African human rights systems can be compared. Firstly, the foundational instruments of international and regional human rights instruments all indicate a commitment to the rights set out in the Universal Declaration of Human Rights ("UDHR"). Secondly, these treaties all contain the following provisions in similar wording: the rights to human dignity, non-discrimination and equal protection of the law, the right to education, and the need to offer special protection to children because of their vulnerability. Thirdly, the European, inter-American, and African regional human rights treaties are aimed at setting standards for the protection of human rights in a particular geographical region based on their commitment to

[41] E Örücü "Methodological aspects of comparative law" (2007) 1 *EJLR* 29 32.
[42] 33.
[43] 33.
[44] G Frankenberg "Critical comparisons: Re-thinking comparative law" (1985) 26 *Harv Int Law J* 411 417.
[45] A Peters & H Schwenke "Comparative law beyond post-modernism" (2000) 49 *Int & Comp LQ* 800 800.
[46] H Muir Watt "Globalization and comparative law" in M Reimann & R Zimmerman (eds) *The Oxford Handbook of Comparative Law* (2006) 580 587.
[47] 583.
[48] E Örücü "Developing Comparative Law" in E Örücü & D Nelkin (eds) *Comparative Law: A Handbook* (2007) 43 47.

rights set out in the UDHR. Thus, the protection of human rights in a particular geographical region is tied to the vision of universal human rights as contained in the UDHR. Finally, the interpretation of the various human rights treaties under the international, European, inter-American, and African systems, can be guided by the teleological approach of interpretation, as set out in the Vienna Convention.

1 4 Significance of the research project

The research is significant as it offers a multifaceted interpretation of the right to education and related rights under the African regional human rights system in order to protect children with non-heteronormative SOGIE in the context of education. Such an interpretation is currently lacking in African literature and is yet to be addressed by the African Court on Human and Peoples' Rights ("African Court") or the African Commission on Human and Peoples' Rights (African Commission). The contribution is of particular relevance in light of the African Commission's withdrawal of the observer status of the Coalition for African Lesbians in August 2018, after months of pressure from the African Union Executive Council, made up of foreign ministers or other ministers designated by the governments of the African Union ("AU") member states.[49] The result is a strong indication that the AU views persons with non-heteronormative SOGIE as not having the right to equal protection of the law under the African regional human rights system. The argument presented in this research is that the law as it stands, to the contrary, protect persons with non-heteronormative SOGIE.

1 5 Scope and limitations of the dissertation

As briefly explained above, the research topic requires the exploration of four separate rights under international and regional human rights law: (i) human dignity; (ii) non-discrimination; (iii) education; and (iv) the best interests of the child principle. In this regard, the international framework, analysed and applied in this research, consists of the UDHR, the International

[49] The Executive Council of the African Union is composed of ministers of the member states of the AU. It "coordinates and takes decisions on policies in areas of common interest to Member States". The Executive Council put pressure on the African Commission to revoke CAL's observer status because it contradicts "fundamental African values, identity and good traditions". The fact that the African Commission succumbed to this pressure raises concerns as to the independence of the African Commission from political pressure. See: International Justice Resource Centre "African Commission bows to political pressure, withdraws NGO's observer status" (18-08-2018) *IJR Center* < https://ijrcenter.org/2018/08/28/achpr-strips-the-coalition-of-african-lesbians-of-its-observer-status/> (accessed 13-01-2019); AU "Executive Council" (2020) *AU* < https://au.int/en/executivecouncil> (accessed 8-12-2020).

Covenant on Civil and Political Rights ("ICCPR"),[50] the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"),[51] the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"),[52] and the Convention on the Rights of the Child ("CRC").[53] Under European human rights law, the European Convention of Human Rights and Fundamental Freedoms ("ECHR"),[54] the European Social Charter ("ESC")[55] and the Revised European Social Charter ("ESC(r)")[56] are considered. In respect of the inter-American system, the research primarily draws from the American Declaration on the Rights and Duties of Man ("ADRDM")[57] and the American Convention of Human Rights ("ACHR").[58] The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador)[59] and the inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women ("Convention of Belém do Pará")[60] are also considered, albeit to a lesser extent. Importantly, throughout the analysis reference is made to the YP and YP plus 10 where courts and treaty bodies have utilised these principles to interpret the above-mentioned treaties.

The reason for the focus on international and regional human rights law is because the human rights bodies attached to these treaties are responsible for setting human rights standards, influencing other international and regional human rights bodies and elucidate state obligations. Furthermore, because human rights bodies are often the last forum for determining a human rights violation, their decisions can catalyse change in states where the government or domestic courts were – up to that point – unwilling to find a violation of a particular right. This is evident from the international and regional jurisprudence pertaining to the rights of persons with non-heteronormative SOGIE discussed in chapters 4 to 6. For the same reason as the chosen focus on international and regional human rights law, the jurisprudence of the African sub-regional courts is not considered.

Because the research concerns the right to education of children with non-heteronormative SOGIE, the criminalisation of homosexual conduct in individual African states is not explored

[50] (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[51] (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[52] (adopted 3 September 1981, entered into force 3 September 1981) A/RES/34/180
[53] (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[54] (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.
[55] (adopted 18 October 1961; entered into force 26 February 1965) ETS 35.
[56] (adopted 3 May 1996, entered into force 1 July 1999) ETS 163.
[57] (adopted 2 May 1948).
[58] (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143.
[59] (adopted 17 November 1988, entered into force 16 November 1999) OASTS 69.
[60] (adopted 9 June 1994, entered into force 5 March 1995) 33 ILM 1534.

in detail. Rather, the focus is on the obligations imposed by the ACHPR, the ACRWC, and the Maputo Protocol to ensure that children with non-heteronormative SOGIE can enjoy their right to education. However, it is important to note that criminalising homosexual conduct exacerbates the discrimination that all persons experience based on their real or imputed sexual orientation.

Furthermore, despite the importance of the African Youth Charter ("AYC"),[61] it has limited application for the specific research questions set out under 1 2. The AYC applies to persons between the ages of 15 and 35.[62] As this research is concerned with children, being persons up to and including the age of 18, the AYC does not provide protection to all children, but only to a select group between the ages of 15 and 18. Furthermore, the AYC refers to the ACRWC and reaffirms "the need to take appropriate measures to promote and protect the rights and welfare of children".[63] The ACRWC provides more comprehensive provisions relating to the protection and promotion of the rights of the child. The AYC does not add to the ACRWC, but rather extends its application to persons up to the age of 35.

As a point of departure, it is important to note that the treaties under consideration recognise that human rights stem from the individual's inherent human dignity. As such, human dignity also informs the right to equality and non-discrimination, education, and the best interests of the child. The purpose and object of all the instruments under discussion are to ensure the rights of all persons on equal terms without discrimination. Most of the monitoring mechanisms attached to the international, European, and inter-American human rights treaties have used the open-ended and inclusive nature of the right to non-discrimination to include non-heteronormative SOGIE as a prohibited ground of discrimination, despite it not being listed in the non-discrimination provisions of these treaties. In this regard, it should be noted that the research does not, and arguably cannot, consider each case dealing with non-heteronormative SOGIE in detail. Moreover, it does not discuss the interpretation of each right insofar as it pertains to non-heteronormative SOGIE rights. Rather, the research presents the most significant cases and legal principles that have arisen in the development of the rights of persons with non-heteronormative SOGIE under international and regional human rights law.

The international, European, inter-American, and African human rights treaties enshrine the right to education. The right to education provided under the UDHR, ICESCR, CRC, and the ACRWC is comprehensive. These instruments protect a formal right to education but also set

[61] (adopted 2 July 2006).
[62] "Youth" in Definitions of the AYC.
[63] Preamble.

out state obligations in respect of providing different levels of education and the aims that education should set out to achieve. In analysing the right to education, the research does not explore the obligations on states to provide for different levels of education. These obligations speak more to the organisational aspects of education, such as the available education budget. Instead, the research focuses not only on the meaning of education in the specific context of ensuring that children with non-heteronormative SOGIE are allowed to go to school, but also that the aims of education accommodate these children and foster acceptance amongst peers, teachers, and parents or guardians. Furthermore, although the prior right of parents in respect of their children's moral and religious education in terms of Article 26(3) of UDHR is considered, the discussion is limited by the lack of interpretive guidance. As a result, the arguments made in this regard rely on a textual reading in the context of the right to education.

The focus on children with non-heteronormative SOGIE presents a broad framework for exploring what a child-friendly education that accommodates and celebrates diversity should look like. In a practical sense, it means that schools cannot choose whether or not to comply with recommendations from international and regional bodies as it would mean that the right to education of children who identify within a heteronormative framework is elevated above that of children with non-heteronormative SOGIE. This would also be in contradiction with the best interests of the child principle, which demands that in all matters concerning the child, the child's best interests have to be considered. The research available on the best interests principle primarily concerns situations where children are separated from their parents or guardians, whether through incarceration or social services, or where decisions have to be made as to a healthcare procedure that the child should undergo. As such, the application of the best interests principle to the right to education is limited because it can only draw from the considerations that have been applied in this context.

As stated in 1 1 above, there is little research on the experiences of children with non-heteronormative SOGIE in schools on the African continent. This limits the extent to which the research can contextualise the issue. As a result, the research considers how the marginalisation and discrimination that persons with non-heteronormative SOGIE experience impacts on their human dignity and ability to fully enjoy their rights. This is then applied to the right to education, read with the best interests principle, to expound on state obligations in this regard.

Finally, the research undertaken is not concerned with guiding litigation on the right to education of children with non-heteronormative SOGIE. It also does not consider whether non-heteronormative SOGIE rights are justiciable before the African Court or the African

Commission. Rather, it sets forth a holistic and purposive interpretation of the right to education under the ACHPR, the ACRWC, and the Maputo Protocol, one that is informed by international and regional human rights law.

1 6 Chapter outline

Chapter 2 introduces the theoretical approach that underlies the research. Under 2 2, the various terms relevant to the research are introduced. An explanation is also provided as to how the conflation of sex, gender and sexual orientation has resulted in heteronormative privilege and the othering of SOGIE that falls outside this framework. Thereafter, in part 2 3, the developments that led up to the establishment of queer theory is considered. This discussion starts with the essentialist and constructionist debate and how it influenced the current conceptions of the terms defined in part 2 2, after which the impact of the homophile movement, the gay and lesbian liberationist movement, and the lesbian feminist movement on the establishment of queer theory is considered. It is the criticism and gaps in these movements that ultimately gave way to queer theory, which claims to be a more inclusive theoretical framework.

In part 2 3, the main elements of queer theory are introduced. In this discussion, it is illustrated that queer theory's appropriateness as a theoretical perspective lies in its wide scope, which includes non-heteronormative SOGIE. Queer theory's claim to inclusivity is utilised in support of a universalist approach to human rights under chapter 3. In part 2 3, reference is also made to QLT and how various strategies can be implemented in a manner that allows queer theory to inform the law to ultimately protect the rights of sexual minorities.

Under 2 5, it is shown that that the social constructionist nature of sexuality and the establishment of heterosexuality as a privileged norm has influenced African conceptions of non-heteronormative SOGIE. In this discussion, the colonialist depiction of Africans as sexual spectacles is considered, as well as the resulting conception that non-heteronormative SOGIE is un-African. Finally, in part 2 6, the value of queer theory and QLT in exploring the subtle and complex ways in which heteronormativity enforces the othering of persons that identify outside the framework of heterosexuality is explained, as well as how this othering ultimately influenced the initial formulation of fundamental human rights as contained in the ACHPR, ACRWC and the Maputo Protocol.

Chapter 3 sets out the legal methodology utilised in this research. Under 3 2, the teleological approach to interpretation is introduced. The discussion focuses on two elements. Firstly, what

the teleological approach entails. Secondly, its value as a method of interpretation to provide substantive protection to children with non-heteronormative SOGIE in law. Under 3 3, the principle that human rights are universal is discussed. This includes consideration of where the notion of universal human rights originated and how the current understanding of universal human rights stems from the ideological patrimony of the West. Furthermore, the debate between the universality of human rights and cultural relativism is considered, reflecting on how cultural relativism influences the interpretation and application of universal human rights. Moreover, this is informed by the idea that regional human rights systems are perhaps best situated to foster compliance with international human rights norms.

Chapter 4 tracks the interpretation and development of the right to human dignity, equality and non-discrimination, education, and the best interests of the child principle under international human rights law. The structure under each main heading from 4 2 to 4 5 is the same. It sets out and analyses the development and interpretation of the right to human dignity, equality, non-discrimination, and education under the UDHR, ICCPR, ICESCR, and CEDAW. The structure under 4 6 is similar to that of 4 2 to 4 5, with an added section dealing with the best interests of the child under the UNCRC. Finally, this chapter considers what the YP and YP+10 add to the interpretation of the rights under discussion, as it "affirm[s] binding international legal standards with which all States must comply" and has the potential to "mould conduct on the international scene".[64]

Chapters 5 and 6 follow the same structure as chapter 4. Whereas chapter 5 sets out the interpretation and development of the right to human dignity, equality and non-discrimination, education, and the best interests of the child principle under the ECHR, ESC, and the ESC(r), chapter 6 does so in respect of the ADRDM, ACHR, Protocol of San Salvador, and the Convention of Belém do Pará.

Chapter 7, like chapters 4 to 6, aims to provide an interpretation of the right to human dignity, non-discrimination, and the best interests of the child that protects the rights to education of children with non-heteronormative SOGIE under the ACHPR, the ACRWC, and the Maputo Protocol. The discussion on the ACHPR and the African Committee of Experts on the Rights and Welfare of the Child ("ACERWC") follows the same structure as that under chapters 4 to 6. However, the ACRWC is preceded by an analysis that seeks to balance the best interests of the child and the child's right to participate against the duties imposed by Article

[64] Available at <https://yogyakartaprinciples.org/principles-en/> (accessed 27-05-2019); RMM Wallace & O Martin-Ortega *International Law* (2013) 30.

31. The Maputo Protocol is explored under 7 5, firstly defining the elimination of all forms of discrimination against women as inclusive of any persons who identifies as a woman. Thereafter, human dignity is discussed in relation to the obligation to eliminate harmful practices. Finally, the right to education is considered in light of the right to non-discrimination. Chapter 7 concludes with an exposition of a teleological approach to the interpretation of the right to education of children with non-heteronormative SOGIE under the African regional human rights system.

Chapter 8 synthesises the research. 8 2 sets out the main findings of the research, indicating how it relates to the research questions set out under 1 2. Against the backdrop of the main findings, the value of the research is explained under 8 3. Under 8 4, recommendations are presented as to how best to protect the rights of children with non-heteronormative SOGIE under the ACHPR, the ACRWC, and the Maputo Protocol. Finally, under 8 5, potential avenues for future research are discussed.

2 Queer theory and African conceptions of SOGIE

2 1 Introduction

As stated under 1 above, this thesis concerns whether the regional African human rights system enables children with non-heteronormative SOGIE equal access to, and enjoyment of, the right to education. In this regard, children with non-heteronormative SOGIE's access to, and enjoyment of, the right to education is compared to that of children with heteronormative and binary conceptions of sex and gender. At the core of this question lies the heteronormative and non-heteronormative divide and how cultural and societal conceptions of sex, gender and sexual orientation influence how persons are viewed and treated. These conceptions ultimately influence the formulation, interpretation and application of regional human rights law instruments such as the ACRWC, ACHPR and the Maputo Protocol.

2 2 Terminology and its conflation

2 2 1 Terminology

Various terms must be defined for purposes of this research. The YP and YP+10 are used as a point of departure in the formulation of these terms, setting out how various fundamental human rights can be interpreted to provide explicit recognition and protection of the human rights of all individuals, without distinction based on sexual orientation, gender identities or gender expressions. In this regard, a universalist approach is utilised, further discussed under 3 4.

Gender and sex are often conflated.[1] Whereas sex refers to a person's "biological features such as chromosomes, hormones, internal and external sexual and reproductive organs"[2] – that is, male, female, intersex[3] – gender is a social construct that dictates the accepted behaviour and roles to be adopted based on sex.[4] Gender operates in different theoretical paradigms. This is further elaborated on in parts 2 3 and 2 4 below discussing Queer theory as the theoretical perspective that informs this research.

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[1] See the text to part 2 2 2.
[2] Vollmer *Queer families* 46 quoting M Hawkesworth "Confounding gender" (1997) 22 *Signs* 649 656.
[3] African Commission, IACmHR, UN "Ending violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission of Human and Peoples' Rights, Inter-America Commission on Human Rights and United Nations" (2016) *PULP*: "An intersex person is born with sexual anatomy, reproductive organs, and/or chromosome patterns that do not fit the typical definition of male or female" 2.
[4] JE Battaglia "Gender" in RL Jackson II & MA Hog (eds) *Encyclopedia of Identity* (2010) 306 306.

The Preamble to the YP defines sexual orientation and gender identity. Sexual orientation is defined as referring to:

> "[E]ach person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender".[5]

This definition recognises that sexual orientation is not just heteronormative. In other words, it does not just refer to emotional, affectional and sexual attraction to a person of the opposite sex. The reference to gender also indicates the recognition that sex and gender are different. The Preamble furthermore defines gender identity as follows:

> "Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (…) and other expressions of gender, including dress, speech and mannerisms".[6]

For purposes of this research, gender includes masculine, feminine, and transgender. The Joint Dialogue of the African Commission, Inter-American Commission and UN on *Ending violence and other human rights violations based on sexual orientation and gender identity* ("Joint Dialogue")[7] defines transgender as:

> "[A]n umbrella term used to describe a wide range of identities … [including persons] whose appearance and characteristics do not correspond with the sex they were assigned at birth and/or are perceived as gender atypical".[8]

The definitions of sexual orientation and gender identity set out in the Joint Dialogue are similar to that of the YP. However, these terms are explained in more detail and less complex language in the Joint Dialogue. According to the Joint Dialogue, all people have a sexual orientation. Sexual orientation refers to "a person's physical, romantic and/or emotional attraction towards other people",[9] and is unrelated to gender identity. In its definition of sexual orientation, the Joint Dialogue also refers to the meaning of gay, lesbian, heterosexual and bisexual:

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[5] Preamble to the Yogyakarta Principles.
[6] Preamble.
[7] African Commission, IACmHR, UN "Ending violence" (2016).
[8] 2.
[9] 1.

> "Gay men and lesbian women are attracted to individuals of the same sex as themselves. Heterosexual people … are attracted to individuals of a different sex from themselves. Bisexual people may be attracted to individuals of the same or different sex".[10]

The human rights violations mentioned under 1 above and elaborated on under chapters 4 to 7 below, are often founded in homophobia and transphobia. According to the Joint Dialogue:

> "Homophobia [refers to] an irrational fear of, hatred or aversion towards lesbian, gay or bisexual people; [whereas] transphobia denotes an irrational fear, hatred or aversion towards transgender people".[11]

These terms form the foundation of an understanding of the complexities surrounding the interpretation of the ACHPR, ACRWC and the Maputo Protocol in a manner that protects the rights of children with non-heteronormative SOGIE. Two things become relevant in the context of the terms set out here: first, the conflation of sex, gender and sexual orientation and how it has contributed to the rise of heteronormative privilege in various societies and cultures across the world; and second, how Queer theory, in light of this conflation, can be utilised as a theoretical perspective to frame the interpretation of the ACHPR, ACRWC and the Maputo Protocol.

2 2 2 Conflating sex, gender and sexual orientation

Against the backdrop of the definitions provided, the conflation of sex, gender and sexual orientation must be further explored. According to Valdes[12], the meaning of sex, gender and sexual orientation has been conflated, with this conflation having been accepted in most societies and thus going unnoticed. Valdes argues that the conflation has three legs; firstly, conflating sex and gender; secondly, conflating gender and sexual orientation; and thirdly, conflating sex and sexual orientation.[13] In essence, "the conflation views sex as the determinant of gender, conceptualizes gender as the social dimensions of sex, and treats sexual orientation as the sexual dimensions of gender".[14]

In terms of the first leg, sex is conflated with gender. As stated under 2 2 1, sex refers to a person's biological features. However, according to Valdes, sex is understood, in a narrower

[10] 1.
[11] 2.
[12] Valdes (1995) *Cal L Rev* 12.
[13] 12.
[14] 19.

sense, as referring to a person's external genitalia. Whereas sex refers to a person's external genitalia, gender is a social construct that influences how a person views and conducts themselves. In terms of the conflation of sex and gender, a person's sex is also his or her gender.[15] Gender is understood as either masculine or feminine, with the former associated with being "strong, assertive, virile, macho [and] rational" and the latter with being "weak, passive, quiescent, soft [and] emotional".[16] In terms of this conflation then, the masculine gender is assigned to the man-sex and the feminine gender to the woman-sex.[17]

The second and third legs of conflation can be considered together. In the consideration of the conflation of gender and sexual orientation, the conflation of sex and sexual orientation becomes relevant. The conflation of sex and sexual orientation becomes clear when considering the heterosexual and homosexual divide. Where a man – a person with a penis, being the external genital of a man – is attracted to a woman – a person with a vagina, being the external genitalia of a woman – this coupling is viewed as heterosexual. In contrast, where a man is attracted to another man or a woman is attracted to another woman, this coupling is viewed as homosexual. In this sense then, sex is seen as determining sexual orientation.[18] The conflation of gender and sexual orientation must be understood with consideration of the sex-gender conflation. The sex-gender conflation assigns the masculine gender to the man-sex and the feminine gender to the woman-sex, with the conflation of gender and sexual orientation then favouring a coupling which supports the sex-gender and sex-sexual orientation conflations: a man must be masculine and have erotic feelings towards or desire a woman who is also feminine.[19]

The conflation of sex, gender and sexual orientation contributed to establishing the correctness of a man having to be masculine being attracted to a woman having to be feminine.[20] This conflation embodies the essentialist approach, which is discussed in more detail under 2 3 1. As a result of this understanding, those who conduct themselves outside this framework – for example, men who are feminine or women who are masculine – are viewed as inverts for their "failure to adopt the multiple gender stances assigned to her or him at birth based exclusively on external genitalia, or sex".[21] These persons are seen as being in the wrong

[15] 12.
[16] Valdes (1995) *Cal L Rev* 22 quoting JC Williams "Deconstructing Gender" (1989) 87 *Mich L Rev* 797 840.
[17] 42.
[18] 15.
[19] 39-41.
[20] 55.
[21] 51.

and can therefore be "targeted and diagnosed [for breaking] … official sex-determined gender codes".[22]

2 3 The development of queer theory

2 3 1 Essentialist versus constructionist debate

The essentialist-constructionist debate influences how the terms set out are understood because the essentialist and constructionist conceptualisation of sexual orientation and sexualities differ. According to Kepros, the essentialist understanding of sexual orientation and sexualities stem from a biological model. In comparison, the constructionist understanding relies on a social model which considers how a particular context produces certain labels and modes of understanding behaviour.[23]

According to the essentialist conception, sexual orientation and gender are objective and intrinsic characteristics that are independent of culture.[24] Essentialism asserts that sexual orientation and gender are consistent regardless of culture, region and time.[25] Therefore, for example, where a person of one sex is attracted to a person of the same sex, that coupling would be viewed as homosexual because sexual orientation and gender exist across time and space.

In contrast to essentialism, the constructionist approach contends that sexual orientation and gender identities depend on cultural, geographical and historical context. According to constructionists, sexual orientation and gender identities are the result of social conditioning and the available cultural references in terms of which a person can find expression.[26] In terms of this understanding, neither sexual orientation nor gender identities constitute the core of a person. In this sense then, the constructionism is associated with postmodernism which contends that all things must be understood within its context. In line with this, constructionism holds that because concepts have different meanings in different contexts, nothing can be truly universal.[27] Therefore, in contrast with the essentialist approach, constructionism does not accept that the same homosexual identity can exist across culture, region or time. This can be

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[22] 55.
[23] Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 286.
[24] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 333; A Jagose *Queer Theory: An Introduction* (1996) 8; Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 286.
[25] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 334 and 336; Jagose *Queer Theory: An Introduction* 9; GA Yep "Gay, Lesbian, Bisexual and Transgender Theories" in SW Littlejohn & KA Foss (eds) *Encyclopedia of Communication Theory* (2009) 421 422.
[26] De Vos "Gay and Lesbian Legal Theory in *Jurisprudence* 333-334; Jagose *Queer Theory: An Introduction* 8-9; Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 286; Yep "Gay, Lesbian, Bisexual and Transgender Theories" in *Encyclopedia of Communication Theory* 422.
[27] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 334; Jagose *Queer Theory: An Introduction* 9.

illustrated at the hand of two examples. Firstly, the acceptance of the Greek "paederast" [28] and Native American "berdache"[29] by their communities – both of whom would be viewed as homosexuals in terms of its modern conception.[30] Secondly, the so-called birth of the modern concept of homosexual identities in the second half of the 1800s in Europe and its subsequent dispersion.

Foucault sites 1870 as the birth of homosexual identities when medical discourse equated sodomy with homosexuality. Prior to this, sodomy was merely viewed with disinterested disapproval by the larger society: an activity that only some men chose to engage in.[31] D'Emilio sites the same time as the birth of homosexual identities. However, whereas Foucault refers to the medicalisation of sexualities as the decisive event, D'Emilio argues that the rise of capitalism was also influential. According to D'Emilio, capitalism allowed individuals to earn their wages outside of the interdependent heterosexual familial unit. This enabled individuals to construct their personal lives around their sexual orientation, not the family unit.[32]

Based on this discussion of the essentialist-constructionist debate, this research puts forth that the constructionist conception of sexual orientation and gender identities is more befitting to current modes of understanding and therefore more convincing. This is expanded on under 2 5 where African conceptions of SOGIE is discussed, with consideration of how different cultural and geographic contexts inform different understandings thereof. The discussion under 2 3 2 also favours constructionism, illustrating how the homophile, gay and lesbian liberationist- and lesbian feminist movements contributed to the ultimate establishment of queer theory.

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[28] DA Hall "A Brief, Slanted History of 'Homosexual' Activity" in I Morland & A Willox (eds) *Queer Theory* (2005) 96 100; Jagose *Queer Theory: An Introduction* 8: The Greek "paederast" refers to a married adult man who sometimes penetrate a man-adolescent during the classical period. This act was associated with power- and social status.

[29] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 336; Valdes (1995) *Cal L Rev* 224; Jagose *Queer Theory: An Introduction* 8; Yep "Gay, Lesbian, Bisexual and Transgender Theories" in *Encyclopedia of Communication Theory* 423: The Native American "berdache" refers to where an adult man with feminine qualities marries another man, or *vice versa*.

[30] In terms of the modern understanding of sexual orientation, because one man penetrates or marries another, the coupling is homosexual. However, in the Greek and Native American societies, the conduct of these persons did not seem to have a defining impact on their sexual- or gender identities. Constructionism often site these examples as evidence that there can be no universal identities because it is deeply embedded in cultural conceptions.

[31] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 335; Hall "A Brief, Slanted History of 'Homosexual' Activity" in *Queer Theory* 104; Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 286.

[32] Jagose *Queer Theory: An Introduction* 13; Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 286.

2 3 2 Developing queer theory

The homophile-, gay and lesbian liberationist- and lesbian feminist movements arose prior to the development of queer theory. These movements contributed to a wider tolerance and recognition of non-heteronormative SOGIE. Queer theory emerged in academic discourse in the United States in the 1990s as a philosophical and intellectual concept. It was put forward as an attempt to address the criticisms raised against a too narrow understanding of SOGIE and how this influences the social, political and economic circumstances of individuals.[33]

It is impossible to cite the specific moment when the movement towards the acceptance of non-heteronormative SOGIE begun. The homophile movement, 1940-1970, is one of the earliest movements of this kind in the US. It was aimed at promoting tolerance of homosexual identities through educational programmes, ultimately bringing about legal and social reform that would place homosexuals on equal terms with heterosexuals.[34] The homophile movement argued that the difference between homosexual and heterosexual persons was limited to the former's same-sex attraction, in contrast with the latter's opposite-sex attraction.[35] Furthermore, the movement put forth that same-sex attraction, like opposite-sex attraction, is a natural human phenomenon.[36] Because of the conservative culture at the time, which "defined homosexuality as beyond respectability", the homophile movement had limited success.[37]

The gay and lesbian rights movement arose out of criticism of the slow progress of the homophile movement in the late 1960s.[38] The Stonewall Riots of 1969 – a protest against the police violence perpetrated against gay men, lesbians and drag queens – catalysed the gay liberation movement in the US.[39] Moving beyond the homophile movement's approach that argued that there was little difference between homosexuals and heterosexuals, the gay and lesbian rights movement challenged the "structures and values of heterosexual dominance" and questioned conventional knowledge about gendered behaviour and sexual orientation.[40]

Drawing from the civil rights movement's approach to equal protection under the law, based on the "equal but different" logic, gay men and lesbians organised themselves based on "their

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[33] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 343; Yep "Queer Theory" in *Encyclopedia of Communication Theory* 817.
[34] J D'Emilio *Sexual Politics, Sexual Communities* (1983) 108-109; Jagose *Queer Theory: An Introduction* 22.
[35] D'Emilio *Sexual Politics* 79; Jagose *Queer Theory: An Introduction* 30.
[36] Jagose *Queer Theory: An Introduction* 22.
[37] D'Emilio *Sexual Politics* 79; Jagose *Queer Theory: An Introduction* 29.
[38] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 338; Jagose *Queer Theory: An Introduction* 30.
[39] D'Emilio *Sexual Politics* 231-233; De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 337; Jagose *Queer Theory: An Introduction* 30.
[40] Jagose *Queer Theory: An Introduction* 31.

collective experience of homophobia".[41] In this sense, the movement was driven by identity politics, which enabled mobilisation towards a common cause: "the recognition of the rights of gay men and lesbians".[42] However, the utilisation of identity politics narrowed the meaning of "gay" and "lesbian" to same-sex attraction.[43] This resulted in the alienation of those who did not find expression in this model which, in turn, gave rise to criticism that the gay and lesbian movement upholds normative identities to the exclusion of transsexual or bisexual individuals, as well as those part of racial or ethnic communities.[44]

Furthermore, from within the gay liberationist movement and the women's liberation movement, lesbian women contended that they remained marginalised and that the commonalities between gay men and lesbians were limited to their same-sex preference.[45] Moreover, they argued that men were viewed as superior to women. As such, women were expected to take their place as men's subordinates.[46] Thus, the 1970s saw the rise of the lesbian feminist movement. According to this movement, the gay liberationist movement was institutionally sexist: the perception of lesbianism as a mere male version of homosexuality failed to take into consideration women's lack of cultural and economic privilege in relation to men.[47] However, like the gay liberationist movement, the lesbian feminist movement too emphasised that gender and sexualities are fluid, and focused their efforts on "transforming oppressive social structures by representing same-sex sexual practices as legitimate".[48]

The homophile-, gay and lesbian liberationist-, together with the lesbian feminist movement, all contributed to the recognition of rights for, or at least tolerance of, persons with non-heteronormative SOGIE. However, the shortcomings of these theoretical approaches gave rise to the need for a model that recognises non-normative categories of identities without elevating one above the other. Queer theory claims to be this inclusive model. In the discussion of queer theory, it is important to acknowledge the following two shortcomings of the movements discussed. Firstly, the utilisation of identity politics in these movements showed acceptance and recognition of the heterosexual-homosexual binary with heterosexuality being independent

[41] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 338.
[42] 338; Jagose *Queer Theory: An Introduction* 77; Vollmer *Queer families* 38.
[43] Jagose *Queer Theory: An Introduction* 61.
[44] 66.
[45] 44 and 47.
[46] J Halley "Queer Theory by Men" in MA Fineman, J E Jackson & A P Romero (eds) in *Feminist and Queer Legal Theory* (2009) 9 10.
[47] 47 and 49.
[48] 60.

of, and superior to, homosexuality. Secondly, the exclusion of those sexual minorities who do not identify within this binary – for example, transgender individuals.[49]

2 4 Queer theory (or deconstructing life as we know it)

2 4 1 Queer theory

Against this backdrop of what led to the need for a model that recognises non-normative categories of identities without elevating one above the other, the term "queer" claims to rise above gay and lesbian theory's reliance on identity politics. Its focus is on the inherent instability of identity and the social and cultural constructionist nature of gender and sexualities. As explained by Jagose:[50]

> "[Queer theory] offers a fresh perspective and a set of tools to critically examine, analyse, and understand social relationships, particularly those organised around current constructions of sexuality and desire. In addition, it highlights the centrality of power and power relations in those relationships and the need to examine and understand them".[51]

Queer theory cannot be defined and is therefore "an identity without essence".[52] Queer theory can have no definite meaning because it is a methodological description.[53] Despite this, it does have characteristics by which it can be identified and explored. Queer theory is wide in scope and includes non-heteronormative SOGIE. According to Kepros:

> "Queer theory views sexuality as a widespread social condition and, thus, a matter of importance to all individuals whether they are in the sexual minority or majority … [and] embraces anyone who identifies … as 'Queer'".[54]

Whereas Kepros argues that queer theory includes anyone who identifies as queer, Yep provides a more definitive definition. According to Yep:

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[49] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 342.
[50] Jagose *Queer Theory: An Introduction* 77; Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 291.
[51] Yep "Queer Theory" in *Encyclopedia of Communication Theory* 817.
[52] Jagose *Queer Theory: An Introduction* 96.
[53] A P Romero "Methodological Descriptions: "Feminist" and "Queer" Legal Theories" in MA Fineman, JE Jackson & AP Romero *Feminist and Queer Legal Theory* (2009) 179 190.
[54] Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 282.

> "[Queer] may mean lesbian, gay, bisexual, two-spirited, transgender, intersexed, questioning, or different because of the individual's sexual and/or gender presentation and expression".[55]

These descriptions indicate the refusal of queer theory to limit itself to a particular form. This shows both its resistance to whatever constitutes normal, as well as an ambition to include those who do not fit a "culturally tidy label".[56] In this sense then, queer theory asserts that SOGIE is fluid.[57] In so doing, queer theory not only erases heterosexual and homosexual as the all-encompassing categories of identification, it also develops the potential meanings of "man" and "woman" through its expansion of "visible, plausible, and liveable sexualities".[58] Instead, queer theory considers how the construction of heterosexuality has maintained itself as a privileged norm that has come to dictate current cultural arrangements and become the standard against which all sexual relations are judged.[59]

Heterosexuality established itself as a privileged norm through its normalisation.[60] It has come to be equated with being good and normal, whereas anything that falls outside of this is bad and abnormal.[61] In this sense, "heterosexuality is defined in opposition to, and given content by, homosexuality".[62] Thus, heterosexuality and homosexuality mutually define each other, the one requires the other to exist.[63]

The establishment of heteronormativity allowed the creation of sexual others and has therefore been described as a site of violence.[64] As a result, queer theory focuses on highlighting and unpacking how this normalisation of heterosexuality has produced an unmarked and often invisible heteronormativity that informs "structures of understanding, practical orientations, cultural discourses and social institutions that construct heterosexuality as privileged, morally right, coherent and stable".[65] By drawing focus to the modes of

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[55] Yep "Queer Theory" in *Encyclopaedia of Communication Theory* 818.
[56] Jagose *Queer Theory: An Introduction* 99; Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 283; S Marcus "Queer Theory for Everyone: A Review Essay" (2005) 31 *Signs* 191 196.
[57] Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 282; Marcus (2005) *Signs* 196.
[58] Marcus (2005) *Signs* 200.
[59] Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 284; MA Fineman "Introduction: Feminist and Queer Legal Theory" in M A Fineman, J E Jackson & A P Romero *Feminist and Queer Legal Theory* (2009) 1 5; Yep "Queer Theory" in *Encyclopaedia of Communication Theory* 818.
[60] Yep "Queer Theory" in *Encyclopaedia of Communication Theory* 818: Normalisation "refers to the proves of constructing, establishing, and (re)producing an all-encompassing standard of goodness, desirability, morality, and superiority in a cultural system".
[61] 819.
[62] Vollmer *Queer families: An analysis of non-heteronormative family rights under the African human rights system* 37.
[63] Marcus (2005) *Signs* 197.
[64] JT Weiss "The gender caste system: Identity, privacy, and heteronormativity" (2001) 10 *Law & Sexuality* 123 124; M Lloyd "Heteronormativity and/as violence: the "sexing" of Gwen Araujo" (2013) 28 *Hypatia* 818 818.
[65] Yep "Queer Theory" in *Encyclopaedia of Communication Theory* 818.

understanding produced by heteronormativity and the power relations at play, queer theory creates a platform for "imagining, inventing and enacting other social arrangements".[66]

2 4 2 Queer legal theory

Utilising the tenets of queer theory, QLT questions the social constructions surrounding the categories of sex, gender and sexual orientation, as well as how the conflation thereof has shaped the formulation, interpretation and application of law. Valdes sets out strategies of how QLT can be implemented in a manner that allows queer theory to inform the law to ultimately provide protection to the rights of sexual minorities and attain "sex/gender dignity and freedom for every individual".[67]

According to Valdes, the conflation of sex, gender and sexual orientation must be contextualised as a cultural invention. It must be recognised that, as a result, discrimination on one ground implicates another: it cannot occur in isolation.[68] However, it is not enough to recognise the conflation. What is required is a resistance to the stereotypes that have developed with the conflation of sex, gender and sexual orientation because the conflation is strengthened thereby.[69] Without a substantial move from this, "efforts toward both social and sexual equality will be necessarily limited to a system that subordinates some and privileges others".[70]

Valdes suggests that QLT brings accounts of the lived realities of sexual minorities into the law. These accounts illustrate the consequences of heterosexism, including the oppression and marginalisation of sexual minorities.[71] Relevant examples concerning the lived realities of sexual minorities in various African states are discussed under 2 5. Valdes further recommends the development and subsequent active and insistent dissemination of constructionist sensibilities. This can be done through testing essentialist categories of sex, gender and sexual

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[66] 818.
[67] Valdes (1995) *Cal L Rev* 321 362.
[68] 321.
[69] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 345: In essence, this means that the law must move away from thinking that a person with a penis (the external genitalia of a man, often equated with sex) must be masculine (the gender that has been attached to the man-sex) and must be attracted (the sexual orientation of the man) to a person with a vagina (the external genitalia of a woman, often equated with sex) who must be feminine (the gender that has been attached to the woman-sex).
[70] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 345; Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 295.
[71] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 345; Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 295; Valdes (1995) *Cal L Rev* 366.

orientation against the lived realities of sexual minorities, thereby "encourage[ing] exploration of potential alternatives to the sex/gender *status* quo" that would otherwise not be possible.[72]

Of significance is the proposal that QLT develops sexual orientation into a coherent idea. The argument put forth is that should sexual orientation be developed into a functional social and legal construct, it could prevent the use of conceptions that are inimical to the recognition and protection of sexual minorities in law.[73] As part of the conceptualisation, Valdes suggests that QLT defends desire as a "legitimate form of bodily pleasure [and] an important feature of human experience".[74] The de-shaming of sex and the recognition that "consensual affection and intimacy … are felt by all humans in one form or another" has the potential to have persons with non-heteronormative SOGIE not just be tolerated, but also celebrated.[75]

Valdes explains that QLT should promote the idea that sexualities "function in various social, economic, and political settings on equal terms"[76] and that it therefore transcends private life.[77] As a result, it can be argued that all sexualities function in both public and private life, and that sexual minorities cannot, as such, be limited to private life. As stated by Valdes:

> "The ultimate goal, dignity and equality, requires the right of sexual minorities to be open – to be active in our occupations and secure in our homes without having to choose continually between a life of closeted deceptions and a life of enduring homophobic bigotries".[78]

Valdes' final suggestion for how QLT can be implemented to provide protection to the rights of sexual minorities, concerns the intersectionality between various identity markers that shape people and their experiences.[79] Intersectionality, he suggests, allows consideration of how "multiple axes of discrimination … operate in tandem".[80] In this regard, the interaction between SOGIE and culture is significant.

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[72] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 346; Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 296; Valdes (1995) *Cal L Rev* 367.
[73] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 346; Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 296; Valdes (1995) *Cal L Rev* 367.
[74] Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 296-297.
[75] Valdes (1995) *Cal L Rev* 369; De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 347; Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 297; Valdes (1995) *Cal L Rev* 368.
[76] Valdes (1995) *Cal L Rev* 370.
[77] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 347; Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 297.
[78] Valdes (1995) *Cal L Rev* 370.
[79] De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* 347; Kepros (1999-2000) *Law and Sexuality Rev Lesbian and Gay Legal Issues* 297; Valdes (1995) *Cal L Rev* 371.
[80] Valdes (1995) *Cal L Rev* 372.

2 5 African conceptions of SOGIE

2 5 1 Colonialist depictions: Africans as sexual spectacles

The meaning attached to concepts relating to SOGIE mainly "reflect realities and experiences outside Africa".[81] This section discusses the perception that non-heteronormative SOGIE has been imported with the colonisation of Africa.[82] Regardless of their origins, these concepts have nonetheless become central to the current understandings of "acceptable" or "appropriate" sexual orientations, gender identities and gender expressions in African states.

The earliest written records of African[83] sexualities contain accounts of the experiences of missionaries and colonialists in parts of Africa during the late nineteenth century.[84] These accounts depict Africans as insatiable, subject to their "immoral, bestial and lascivious" sexualities.[85] Africans, and African women, in particular, were viewed as barbaric and savage for their failure to hide their sexualities as was the norm in the Victorian-age in Europe at the time.[86] Thus, with colonisation came the essentialist belief that African bodies were different from others. African bodies were viewed as biologically inferior to others based on "ideas about their distinctively pathological sexuality".[87] These conceptions developed and became ingrained as a result of research into African cultures and sexualities, framing them as "different, less urbane and inferior to those of the West".[88]

Despite being perceived as inferior, colonialists still saw Africans as "amenable to cultural assimilation and development".[89] As a result, the Christian faith was used to convince Africans to adopt the so-called civilised manners of their colonisers, excluding polygamous relationships, proscribing acting on desire or seduction in public, and prohibiting same-sex sexual conduct.[90] The colonialist-project succeeded in ingraining religion and Victorian-age

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[81] Tamale "Researching and theorising sexualities in Africa" in *African Sexualities: A Reader* 12.
[82] 12.
[83] In using the term "African" this research does not put forth that there is such a thing as a single African culture or understanding of SOGIE. Rather, the term is used in relation to how it has been utilised in colonial discourse: as referring to a uniform group without taking diverse behaviour and practices into consideration. In referring to manhood in Africa, the aim is to elucidate the essence of manhood across various cultures at the same time being aware of the potential essentialising effect thereof. However, it is beyond the scope of this research to consider the possible unlimited number of cultures and sub-cultures on this Continent and the differences of each one.
[84] SO Murray & W Roscoe "Preface: All Very Confusing" in SO Murray & W Roscoe *Boy-Wives and Female Husbands* (1998) xii; Tamale "Researching and theorising sexualities in Africa" in *African Sexualities* 14.
[85] Tamale "Researching and theorising sexualities in Africa" in *African Sexualities* 15.
[86] 15.
[87] D Lewis "Representing African sexualities" in S Tamale (ed) *African Sexualities: A Reader* (2011) 199 200.
[88] Tamale "Researching and theorising sexualities in Africa" in *African Sexualities* 19.
[89] Lewis "Representing African sexualities" in *African Sexualities* 200.
[90] Tamale "Researching and theorising sexualities in Africa" in *African Sexualities* 16; Bennett "Subversion and resistance: activist initiatives" in *African Sexualities: A Reader* 81.

ideas about sex, gender and sexualities into African cultures resulting in most modern African states claiming that non-heteronormative SOGIE is un-African.

2 5 2 Non-heteronormative SOGIE are un-African and a white phenomenon

In black communities, in both the US and in most African countries, it is often put forth that non-heteronormative SOGIE is un-black or un-African.[91] This assertion is based on two assumptions. First, that black identities are heterosexual. Second, that there is a difference between racial identity and a sexual or gender identity.[92] The assertion is that whereas race is a "biologically determined identity, [non-heteronormative SOGIE] is a freely chosen lifestyle".[93]

In terms of this line of argument, pre-colonial Africans were exclusively heterosexual with colonial contact bringing with it non-heteronormative ideas of sexual orientation, gender identities and gender expressions.[94] As averred by Carbado,

> "Before the white man came, African men were strong, noble protectors, providers, and warriors for their families and tribes. In precolonial Africa, men were truly men. And women – were women. Nobody was lesbian. Nobody was feminist. Nobody was gay".[95]

Based on the above, non-heteronormative SOGIE are deemed un-African because it offends African values of procreation and the continuity of the family.[96] Furthermore, because African cultures are deemed heterosexual with colonial contact bringing non-heteronormative SOGIE therewith, there is a backlash against abandoning African cultural values in favour of those of the colonisers.[97] The perception that non-heteronormative SOGIE is un-African and in conflict with various cultures and their traditions "assume that cultures are static and fixed".[98] However, in line with a social constructionist conception, no culture or cultural practice can be fixed

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[91] D W Carbado "Black Rights, Gay Rights, Civil Rights" (2000) 47 *University of California Los Angeles Law Review* 1467 1472-1484; J Todd-Gher "Policing bodies, punishing lives: The African Women's Protocol as a tool for resistance of illegitimate criminalisation of women's sexualities and reproduction" (2014) 14 *AHRLJ* 735 737; S Haskin "The influence of Roman laws regarding same-sex acts on homophobia in Africa" (2014) 14 *AHRLJ* 393 393 and 400.
[92] Carbado (2000) *UCLA L Rev* 1471-1472.
[93] 1471.
[94] Eborah (2012) *IHRLR* 115.
[95] Carbado (2000) *UCLA L Rev* 1476 quoting MT Riggs "Black Macho Revisited: Reflections of a SNAP! Queen" in D Carbado (ed) *Black Men on Race, Gender, and Sexuality: A Critical Reader* (1999) 306 310.
[96] Eborah (2012) *IHRLR* 113.
[97] Ibrahim (2015) *AHRLJ* 267.
[98] Lewis "Representing African sexualities" in *African Sexualities* 210.

because "[e]ven the most seemingly pristine and unchanged cultural practices are affected by history, globalisation and social struggles".[99]

The supposed un-African-ness of non-heteronormative SOGIE must also be viewed against "discourses of national belonging [which] have been anchored in familial scripts and the invention of nations as biological families".[100] In this sense, states require citizens to fulfil their so-called natural roles in their communities.[101] Connected to discourses of national belonging is the perception of manhood in Africa and the significance of sexual relations with women thereto: the more sexual partners a man has, the more masculine he seems to other men.[102] Therefore, sexual relations or gender expressions that fall outside a heteronormative understanding of sex, gender and sexual orientation cause discomfort when not serving heterosexual manhood. This discomfort often leads to acts of violence against and stigmatisation of those who identify within a non-heteronormative SOGIE framework.[103]

However, "anthropological and historical evidence reveals that the claim [that non-heteronormative SOGIE are un-African] is unfounded".[104] Thus, the claim that non-heteronormative SOGIE was introduced by the colonisers is equally unfounded.[105] Instead, non-heteronormative SOGIE has been part of African identities long before the arrival of colonisers. In contrast, it is the rejection of these identities that are un-African.[106]

There are accounts of the existence of diverse understandings and acceptance of non-heteronormative SOGIE in pre-colonial Africa.[107] The Islamic Hararri, who lived in the area close to Harar in Eastern Ethiopia, accepted same-sex sexual relations between men as persons were not excluded based on their same-sex sexual relations.[108] In Southern Ethiopia, the Maale accepted a small minority of the *Ashtime* during pre-colonial times. *Ashtime* refers to a

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[99] 210.
[100] 211.
[101] 211.
[102] K Ratele "Male sexualities and masculinities" in S Tamale (ed) *African Sexualities: A Reader* (2011) 399 400-402.
[103] 405-406: The violence perpetrated is focused on disciplining non-heteronormative sexualities as to further serve heterosexual normalisation, as well as perpetuate masculine domination.
[104] Ibrahim (2015) *AHRLJ* 267.
[105] Murray & Roscoe "Preface: All Very Confusing" in *Boy-Wives and Female Husbands* (1998) xii.
[106] M Mutua "Sexual orientation and human rights" in S Tamale (ed) *African Sexualities: A Reader* (2011) 452 459.
[107] Ibrahim (2015) *AHRLJ* 268: "There is evidence showing not only that same-sex intimacy was tolerated in ancient Egypt, but that at certain periods same-sex relationships were legally recognised. Among the Azande, in precolonial Sudan, male same-sex marriage was legally recognised where dowry was paid to boy-wives and damages were awarded for infidelity. The Meru people of Kenya, the Bantu of Angola and the Zulu of South Africa tolerated transgender men and allowed them to marry other men, while gay prostitution is reported among the Hausa of Nigeria. Effeminate males among the Langi of Uganda were allowed to marry men".
[108] SO Murray & W Roscoe "Overview: Horn of Africa, Sudan, and East Africa" in SO Murray & W Roscoe *Boy-Wives and Female Husbands* (1998) 21 21.

biological man who "dressed like a woman, performed female tasks, cared for their own houses, and apparently had sexual relations with men".[109] Examples from the region that is now Sudan include the Otoro who recognised "men who dressed and lived as women",[110] as well as the Moro, Tira and Nyima who allowed "non-masculine males" to marry other men.[111] In Lesotho, some Basotho women engage in "erotic woman-to-woman relationships".[112] Despite involving same-sex sexual conduct, it was not conceived as lesbianism.[113]

Moreover, in some African cultures, supernatural beliefs surround non-heteronormative SOGIE. An example of this is the gatekeeping-role between this world and the otherworld in order to uphold society's psychic balance fulfilled by gays, lesbians and transgendered persons among the Dagare of Burkina Faso.[114] Another example includes the belief amongst the Ngwa, a sub-ethnicity of the Igbo of south-eastern Nigeria, that homosexual relationships between fellow warriors would strengthen them in war.[115]

2 6 Queer theory and QLT's value to the research in light of African conceptions of SOGIE

2 6 1 The value of the queer lens to the present research

In light of the discussion undertaken in this chapter, the value of a queer lens in analysing and interpreting the right to education of children with non-heteronormative SOGIE within the context of regional African human rights must be considered. The lens adopted consists of queer theory, informed by QLT and an intersectional approach to understanding discrimination and marginalisation.

The value of queer theory for the research undertaken lies in its recognition of the unstable nature of identities and its inclusion of diverse non-heteronormative SOGIE without elevating one above the other. In this regard, queer rethinks the meaning of "man" and "woman" and the gendered behaviour attached thereto. Furthermore, queer theory is valuable for the framework it provides in terms of which the conflation of sex, gender, and sexual orientation can be

[109] 23.
[110] 24.
[111] 24.
[112] Tamale "Researching and theorising sexualities in Africa" in *African Sexualities* 20.
[113] Lewis "Representing African sexualities" in *African Sexualities* 209; Tamale "Researching and theorising sexualities in Africa" in *African Sexualities* 20.
[114] CH Izugbara "Sexuality and the Supernatural in Africa" in S Tamale (ed) *African Sexualities: A Reader* 533 544; SO Murray & W Roscoe "Overview: West Africa" in SO Murray & W Roscoe *Boy-Wives and Female Husbands* (1998) 91 92-93.
[115] Izugbara "Sexuality and the Supernatural in Africa" in *African Sexualities* 544.

explored as social constructs. Queer theory allows and encourages questioning the normalisation of heterosexuality. The normalisation of heterosexuality is what ultimately culminated in the establishment of heteronormativity as a site of violence. It is this site of violence that informs the formulation of legal instruments that do not seem to provide explicit protection to persons with non-heteronormative SOGIE.

It is valuable to add a further intersectional lens to the queer lens. An intersectional lens encourages the deconstruction of sex, gender, sexual orientation, age, and race or ethnicity as oppressive identity categories. According to McCall, "the project of deconstructing the normative assumptions of these categories contributes to the possibility of positive social change".[116] Because the research is concerned with an analysis of African regional human rights law that protects children with non-heteronormative SOGIE in the context of education, it is valuable to consider the potential of QLT.

QLT utilises the tenets of queer theory to question how the conflation of sex, gender, and sexual orientation, as well as the social constructions surrounding it, has shaped the interpretation and application of the law. Through this, QLT allows consideration of how conflation is a social invention, and therefore constructionist in nature. In this sense, QLT is an anti-essentialist lens. Of particular value is that QLT encourages taking into consideration the lived realities of sexual and gender minorities in the development and formulation of the law.[117] In this regard, QLT utilises queer theory to inform the law in a manner that allows recognising and protecting the rights of persons with non-heteronormative SOGIE, which are deemed sexual minorities.

Against the backdrop of the discussion under 2 5 1 and 2 5 2, QLT applied with queer theory allows for a consideration of how the establishment of heteronormativity ultimately influenced the formulation of fundamental human rights as contained in regional African human rights law instruments, and how this possibly exacerbates the discrimination and marginalisation of children with non-heteronormative SOGIE in schools. Ultimately, the value of a queer and QLT lens lies in how it challenges ideas surrounding essentialist identities, with an intersectional lens adding further layers to this approach. This layered approach has the potential to create a more informed understanding of the challenges faced by persons with diverse SOGIE. In light hereof, this research aims to illustrate how the establishment of

[116] L McCall "The complexity of intersectionality" (2005) 30 *Signs* 1771 1777.
[117] The research only engages with the lived realities of children with non-heteronormative SOGIE insofar as it is discussed in secondary sources. Thus, no data is collected by means of observation or interviews. Data is collected through the selection and analysis of relevant texts.

heteronormative ideals permeate our entire existence and have culminated in a site of violence that disregards identities and behaviours that fall outside the norms created thereby. However, it is first necessary to further illustrate how the discrimination and marginalisation experienced by children with non-heteronormative SOGIE is exacerbated by: (i) their non-heteronormative SOGIE; (ii) their race or ethnicity; and (iii) their age i.e., reflecting on the intersectional lens.

2 6 2 Intersecting grounds of discrimination viewed through a queer lens

QLT elucidates how power and oppression operate on intersecting grounds. This research focuses predominately on the intersecting grounds of age, gender, sex, and sexual orientation. Based on the discussion in parts 2 2 and 2 5, it is clear that discrimination based on sex, gender, and sexual orientation intersect. This is a result of the conflation of sex, gender, and sexual orientation. Therefore, this research considers how the conflation of these markers further intersects with others, promoting a nuanced understanding of the multiple dimensions of discrimination and marginalisation experienced by children with non-heteronormative SOGIE in education in the African context. In turn, this understanding forms the backdrop against which various regional African human rights provisions must be viewed. As suggested under 1 above, the ACHPR, ACRWC and the Maputo Protocol provides protection to persons with non-heteronormative SOGIE. However, despite this, the current interpretation of these provisions does not give effect to the purpose envisaged by the ACHPR, ACRWC and the Maputo Protocol.

In terms of the right to education, discrimination based on sex, gender, and sexual orientation intersects with discrimination based on age.[118] Children are generally viewed as vulnerable members of society, worthy of special protection and concern.[119] The development and safety of children is widely perceived as the responsibility of parents, guardians, or the state.[120] In this regard, the principle of the best interest of the child is relevant.

The principle of the best interest of the child is derived from the UNCRC. Article 3(1) of the UNCRC provides that "[i]n all actions concerning children … the best interests of the child shall be a primary consideration".[121] This principle is open-ended in that there are no objective criteria as to what constitutes the child's best interest.[122] However, the UN High Commissioner

[118] Article 1 of the UNCRC; Art 2 of the ACRWC.
[119] Preamble of the UNCRC; Preamble of the ACRWC.
[120] Articles 2-3 and 18-20 of the UNCRC; Arts 19-20 and 25 of the ACRWC; Art 6(i) of the Maputo Protocol.
[121] Art 3(1) of the UNCRC.
[122] S Detrick *A Commentary on the United Nations Conventions on the Rights of the Child* (1999) 88-89.

for Refugees Guidelines on Determining the Best Interests of the Child provides some guidance:

> "The term "best interest" broadly describes the well-being of the child … [which must be] determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence to parents, [and] the child's environment and experiences".[123]

Furthermore, "the child's own views as to what is in his or her own best interest" should also be considered.[124] The best interest of the child principle is related to the child's participation in decision-making. Coyne and Harder explain the complexities surrounding the involvement of children in decision-making in the context of health care, stating that adults want to "protect children from distressing information and the burden of decision-making" and often think that children are incompetent to make these types of decisions.[125] Although this comment was made in the context of children's participation in decision-making in health care settings, it can nonetheless be applied to children's participation in decision-making that affects them in general, as well as their competence to be aware of their non-heteronormative SOGIE and to make decisions in this regard. Children's competence to be aware of or make decisions pertaining to their non-heteronormative SOGIE can be undermined by heteronormativity and results in a disregard of children's claims. The best interests of the child principle is expanded on under chapters 4 to 7.

Discrimination based on sex, gender, and sexual orientation also intersects with discrimination based on race. Discrimination and marginalisation based on race go back to the discussion on how African persons were historically viewed as barbaric, animalistic in terms of sexual urges, and genetically inferior to white people. This is evident from the discussion regarding the colonialist perceptions of black Africans. Racial discrimination exacerbates the experiences of persons with non-heteronormative SOGIE who already experience discrimination based on their non-heteronormative identities or expressions.

Bearing in mind the impact of racial discrimination on the experiences of persons with non-heteronormative SOGIE, the argument presented is that a similar approach can be taken with regard to different ethnicities. In Africa, the issue is not necessarily that of black people being

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[123] UNHCR "UNHCR Guidelines on Determining the Best Interest of the Child" (May 2008) 14.
[124] Detrick *A Commentary* 89; A Bucataru "Using the Convention on the Rights of the Child to project the rights of transgender children and adolescents: The context of education and transition (2016) 3 *QMHRRR* 59 65; I Coyne & M Harder "Children's participation in decision-making: Balancing protection with shared decision-making using a situational perspective" (2011) 14 *Journal of Child Health Care* 312 313.
[125] Coyne & Harder (2011) *Journal of Child Health Care* 313.

considered inferior to white people.[126] Rather, because all African countries have a majority black population, discrimination is more likely to occur based on a combination of both racial and ethnic grounds, where one group has a majority population or is more economically and socially powerful than another. Discrimination based on ethnic grounds is founded on the belief that ethnic groups are "fundamentally dissimilar in nature and irreconcilable in practice".[127] Furthermore, the dominant group in a society or state often perceive themselves as superior to minorities. Minorities are viewed as threatening the privileges of the dominant group, competing for resources.[128]

2 6 3 Heteronormativity as a site of violence

According to Lloyd, heteronormative violence refers to the "violence that constitutes and regulates bodies according to normative notions of sex, gender, and sexuality".[129] In this regard, "gendered and sexualized physical harms" must be considered, as well as the ways heteronormativity manifests itself in society.[130] Heterosexuality is viewed as the so-called natural and normal human experience. In contrast, any form of identity or expression that falls outside the heterosexual framework is perceived as abnormal.[131] Heterosexuality not only includes sexual orientation, but also the gendered behaviour attached thereto as a so-called natural phenomenon and the result of normal psychological development.[132]

The perception that sex determines gender and sexual orientation is violent for its regulation and maintenance of "reproductive sexuality as a compulsory order".[133] Butler suggests that, in this way, "the category of sex itself [becomes] a material violence".[134] The violence referred

[126] This is not the case in South Africa. During apartheid, white people were deemed superior to all other racial groups. Race determined the value of the individual, which in turn determined human rights. Discrimination against black South Africans was ingrained in legislation, regulating all aspects of life. In modern South Africa, racial discrimination is no longer legislated. However, the effects of apartheid still linger, clearly visible in the interactions between racial groups. Moreover, the white population remains the most privileged in terms of land ownership, access to services, and is the group with the lowest unemployment rate. In comparison, the black population remains the most excluded.

[127] B Hartley "Rwanda's post-genocide approach to ethnicity and its impact on the Batwa as indigenous people: an international human rights law perspective" (2015) 15 *QUT Law Review* 51 53; U Ukiwo "The study of ethnicity in Nigeria" (2005) 33 *Oxford Development Studies* 7 8.

[128] Y Wu & L Cao "Race / ethnicity, discrimination, and confidence in order institutions" (2018) 41 *Policing: An International Journal* 704 705.

[129] Lloyd (2013) *Hypatia* 818.

[130] 819-820.

[131] 823.

[132] 824.

[133] 824.

[134] J Butler *Gender trouble: Feminism and the subversion of identity* (1990) 116.

to here is the regulation of bodies through language, as well as through norms of gendered behaviour.[135]

King considers how heteronormative language is used, directly and indirectly, to exclude and marginalise persons with non-heteronormative SOGIE. Heteronormative language has become institutionalised through the creation and continued sustaining of opposites within the categories of sex, gender, and sexual orientation. The result is being marked as either "he" or "she".[136] These opposing markers are also used to police masculine behaviour and to degrade feminine behaviour and queer identities. In this regard, men who do not conduct themselves in terms of approved masculine behaviour are called "female" or "homosexual".[137] Heteronormative language is damaging to transgender persons in particular because persons often refuse to acknowledge the gender of transgender persons and address them with the pronoun that corresponds to the sex and gender assigned at birth.[138]

King also considers how norms of gendered behaviour police persons with non-heteronormative SOGIE. She illustrates the role of the media in establishing "appropriate" behaviour for men and women: women must be chaste in terms of dress and conduct, but also be open to the behaviour of men as natural predators.[139] Religion too has a significant role in upholding gendered behaviour. McGuire et al conducted research on "how religion informs and is informed by normative notions of race, gender, and sexuality".[140] The research specifically focused on Christianity and how churches are sites of sexual norming, reproducing hetero-patriarchal masculinity amongst men and a conservative-femininity amongst women. As a result, religious spaces often reject individuals whose sexual orientations, gender identities, or gender expressions do not fit in a strict heteronormative framework. This in turn creates internalised homophobia and transphobia.[141]

McGuire et al's research focused on black Americans. Their research shows how race, sex, gender, and sexual orientation intersect and illustrate how the discrimination and marginalisation from white and black communities differ. Throughout US history, black Americans were made economically and socially inferior to white Americans. Despite the

[135] Lloyd (2013) *Hypatia* 825.
[136] J King "The violence of heteronormative language towards the queer community" (2016) 7 *Aisthesis* 17 17.
[137] 18.
[138] 21.
[139] 18.
[140] KM McGuire, J Cisneros & TD McGuire "Intersections at a (heteronormative) crossroad: Gender and sexuality among black students' spiritual-and-religious narratives" (2017) 58 *Journal of College Students Development* 175 175.
[141] 177.

progress made during the civil rights movement, white Americans still used cultural differences to exclude black Americans from heteronormative privilege in the post-civil rights era. Black Americans were stigmatised as sexually deviant for their "excessive or unrestricted heterosexual desire".[142] This was a result of "higher rates of out-of-wedlock births and female-headed households".[143] Whereas the discrimination against and marginalisation of black Americans by white Americans is based on race, within black communities queerness is often rejected as "undermining community racial uplift[ment]" or as not being "authentically black".[144] Importantly, "queerness is considered a deviant outcome of absent Black father figures, decreased religious values, [and] anti-Black racism's emasculation of Black men".[145]

Although the context of the single-state US and multi-state African continent differ, it is nonetheless possible to draw from McGuire et al's research. Through colonisation, Africans were created into sexual others. Just as white Americans stigmatised black Americans for their "excessive or unrestricted heterosexual desire", Africans were perceived by their colonisers as insatiable, subject to their "immoral, bestial and lascivious" sexualities.[146] Just as some black American religious communities view queerness as undermining community upliftment or as being a result of not being authentically black, some African communities view non-heteronormative SOGIE as un-African because it offends African values of procreation and the continuity of the family.[147]

Ultimately, the result of McGuire et al's research shows how black American college students' "identities were fraught with heteronormative imperatives" as a result of the "messages received from guardians, cultural representations of acceptable femininities and masculinities, as well as how adults and peers embodied and performed their identities".[148] This is also relevant in an African context where identities are tied up with discourses of national belonging. Citizens are expected to fulfil their so-called natural roles in their communities in a manner that serves traditional perceptions of manhood and masculinity.[149] Based on this discussion, it is clear that the heterosexual norm has been established as a privilege. According to Weis:

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[142] 181.
[143] 181.
[144] 181.
[145] 181.
[146] McGuire, Cisneros & McGuire (2017) *Journal of College Students Development* 181; Tamale "Researching and theorising sexualities in Africa" in *African Sexualities: A Reader* 15.
[147] McGuire, Cisneros & McGuire (2017) *Journal of College Students Development* 181; Eborah (2012) *IHRLR* 113.
[148] McGuire, Cisneros & McGuire (2017) *Journal of College Students Development* 185.
[149] Lewis "Representing African sexualities" in *African Sexualities: A Reader* 210.

> "The heterosexual norm is the idea that people are, by virtue of heredity and biology, exclusively and aggressively heterosexual: males are masculine men, and are attracted only to feminine women. The opposite is supposed to be true of females … [H]eterosexuality is not just a norm – it goes much further than that. It is actually a normative principle, a norm which creates a standard to be met, below which people are not permitted by society to deviate: a "heteronormative" standard. This standard has been enshrined into law, transforming a social custom into a legal control mechanism, a sort of "natural law" theory of gender".[150]

Weiss' research compares the inequalities that exist between those who identify within a heteronormative framework, and those who do not, to the historical caste system of India which has created so-called "untouchables" who are excluded from society due to their heredity.[151] Signliore explains that heterosexual persons do not understand why queer persons demand recognition and protection because they do not realise the centrality of their sexuality in their everyday life.[152] Utilising Signliore's statement, Weiss points out how persons who identify within the heteronormative framework takes for granted their own sense of being male or female. According to Weiss, these persons are accorded the privilege to exist without question. They "do not experience the pervasive and life-altering effects of discrimination [based on their sexual orientation, gender identities or gender expressions], and may well wonder if such effects really exist and to what extent".[153]

The discrimination against persons with non-heteronormative SOGIE is pervasive to the extent that it affects all aspects of their lives. Ultimately, heteronormativity permeates both social and legal assumptions, with the conflation of sex, gender, and sexual orientation mapping out the path of an individual's expected existence as soon as sex is perceived at birth.[154] Weiss' argument is made in relation to transgender persons. However, the resulting infringement on the rights to equality and privacy, amongst others, can be applied to the wider queer community. This is of particular relevance when considered in light of Weiss' statement that "[w]e must hear the voices of those who are not heard in the halls of power in order to understand what is happening to them and why".[155]

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[150] Weiss (2001) *Law & Sexuality* 123-124.
[151] 125.
[152] M Signliore "Queer in America: sex, the media and the closets of power" (1993) xxi.
[153] Weiss (2001) *Law & Sexuality* 126.
[154] 160.
[155] 146.

2 7 Concluding remarks

This chapter set out various terms which form the backdrop of the research and illustrated how the conflation of sex, gender, and sexual orientation has culminated in an invisible and violent heteronormative ideal that influences modes of understanding and the formulation of the law.

This chapter also presented the value of an anti-essentialist queer lens. The discussion centred around two points. Firstly, how various identity markers exacerbate the discrimination and marginalisation experienced by children with non-heteronormative SOGIE. Secondly, how the establishment of heteronormativity permeates our entire existence, culminating in a site of violence that disregards identities and behaviours that fall outside the norms created thereby.

A queer lens is valuable for the guidance it offers when used in conjunction with a reform-oriented teleological interpretation of the rights mentioned, as discussed under Chapter 3. A queer lens has the potential to support an interpretation that is inclusive of children with non-heteronormative SOGIE, which in turn supports the argument that the ACHPR, ACRWC, and the Maputo Protocol are amenable to an interpretation that protects children with non-heteronormative SOGIE from discrimination and marginalisation in the context of education.

3 A teleological approach to the interpretation of the right to education of children with non-heteronormative SOGIE

3 1 Introduction

As set out in part 1 3 2 above, this research applies a reform-oriented perspective on classic legal doctrinal methodology because such a perspective and related methods can provide substantive human rights protection to children with non-heteronormative SOGIE. The reform-oriented perspective is informed by queer theory as discussed in chapter 2 and applies a teleological approach to interpretation, as further discussed in this chapter. A key feature of the teleological approach to interpretation is the focus on the object and purpose of the treaty under interpretation. As further argued in this research, the universality of human rights has great bearing on the object and purpose of all human rights and is even more acute in the context of the right to education of children with a non-heteronormative SOGIE.

3 2 A teleological approach to interpretation

3 2 1 The formulation of the teleological approach: The Harvard Draft Convention on the Law of Treaties

There are three main schools of thought pertaining to the interpretation of treaties: (i) the intention of the parties' approach; (ii) the textual approach; and (iii) the teleological approach.[1] These approaches are not mutually exclusive and are often used in conjunction with one another. However, each approach has a preferred method of determining the object and purpose of treaties.[2] Although this section focuses on the teleological approach to interpretation, a brief overview of the 'intention of the parties' approach and the textual approach will nonetheless be provided.

[1] According to ME Villiger *Commentary on the 1969 Vienna Conventions on the Law of Treaties* (2009) 421-422 there are five methods that has been significant in theory pertaining to the interpretation of treaties: (i) the subjective method considers the intention of the drafters; (ii) the textual or grammatical method favours the text; (iii) the conceptual method "appreciates the terms in their nearer and wider context"; (iv) the teleological approach "concentrates on the object and purpose of a treaty and will, if necessary, transgress the confines of the treaty text"; and (v) the logical method, which "favours rational techniques of reasoning". However, I focus on the three discussed by GG Fitzmaurice "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points" (1951) 28 *Brit YB Int'l L* 1 1. It would be redundant to engage with the others for purposes of this research.

[2] Fitzmaurice (1951) *Brit YB Int'l L* 1.

The 'intention of the parties' approach, as its title suggests, is concerned with ascertaining and giving "effect to the intentions, or presumed intentions, of the parties" to the treaty.[3] The textual approach, in contrast with the 'intention of the parties' approach, holds that the object and purpose of a treaty should be determined with reference to the meaning of the treaty text alone.[4] In terms of this approach, no source outside the text itself is to be utilised to determine the object and purpose.[5]

The teleological approach to the interpretation of treaties emerged from the Harvard Law School's Research in International Law Programme.[6] This programme formulated the Harvard Draft Convention on the Law of Treaties ("Harvard Draft")[7] which lists various elements of what is now known as the teleological approach. According to the Harvard Draft, treaties must be "interpreted in the light of the general purpose which it is intended to serve".[8] The Harvard Draft mentions various other factors that must be considered in determining and giving effect to the general purpose:

> "The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made".[9]

Fitzmaurice confirmed and expanded on the approach formulated in the Harvard Draft. According to Fitzmaurice, treaties should be interpreted with "reference to its objects, principles and purposes, as declared, known, or to be presumed".[10] The general purpose of a treaty should be established by the wording of the instrument, the circumstances that existed upon its creation and "the place it has come to have in international life".[11] According to Fitzmaurice, it is valuable to also consider the preamble of a treaty because it can shed light on the meaning of treaty provisions where its purpose is unclear or explain the context in which the substantive treaty provisions should be read.[12] Thus, because the preamble of a treaty often

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[3] 1; M Fitzmaurice "Interpretation of Human Rights Treaties" in D Shelton (ed) *International Human Rights Law* (2013) 739 745.
[4] Fitzmaurice (1951) *Brit YB Int'l L* 1-2.
[5] 7.
[6] Villiger *Commentary* 422; A Amin *A teleological approach to the interpretation of socio-economic rights in the African Charter on Human and Peoples' Rights* LLD thesis, Stellenbosch University (2017) 21.
[7] Draft Convention on the Law of Treaties (1935) *Am J Int'l L* 657.
[8] Article 19(a) of the Draft Convention on the Law of Treaties (1935).
[9] Article 19(a).
[10] Fitzmaurice (1951) *Brit YB Int'l L* 8.
[11] 1-2.
[12] Fitzmaurice (1957) *Brit YB Int'l L* 203 227.

sets out the object and purpose of a document in the form of a vision statement of sorts, it can be used as an interpretative aid that forms the backdrop against which the treaty provisions must be interpreted. Viewed in this light, Fitzmaurice argues that "a preamble does have legal force and effect from the *interpretative* standpoint".[13]

Fitzmaurice further explains that the value of a teleological approach lies in its potential to clear up ambiguities regarding the interpretation of a particular provision or to expand or supplement the treaty text.[14] Its value further lies in its affiliation to both the textual- and the 'intention of the parties' approaches to interpreting treaties. With regard to a textual approach, the teleological approach too prefers "that a treaty is to be interpreted primarily in and with reference to itself, rather than with reference to what has or may be supposed to have taken place in the minds of its makers".[15] However, despite this, Fitzmaurice contends that the teleological approach also draws from the 'intention of the parties' approach. Because the teleological approach requires drawing from a wide range of aspects outside the treaty document itself, the intention of the parties to the treaty must necessarily also be considered to determine the object and purpose of the treaty.[16] Neither the main elements of the textual nor the 'intention of the parties' approaches is paramount to the teleological approach. However, the teleological approach incorporates elements of both as to provide a detailed and accurate understanding of the object and purpose of a treaty.

The Harvard Draft sets out the sources to be considered in a teleological approach to the interpretation of treaties. Fitzmaurice provides some insight as to the value of utilising these sources and expands on the Harvard Draft. However, neither the Harvard Draft nor Fitzmaurice, offers extensive guidance on how to utilise the teleological approach. In this regard, the role of the Vienna Convention is significant.

3 2 2 The role of the Vienna Convention in the establishment of the teleological approach in the interpretation of treaties

3 2 2 1 Article 31: General rule of interpretation

Both the Harvard Draft and Fitzmaurice listed elements of the teleological approach without expanding thereon. Therefore, the development of this approach as per the Vienna Convention is relevant to establish the current understanding and utilisation of the teleological approach.

[13] Fitzmaurice (1951) *Brit YB Int'l L* 25; Fitzmaurice (1957) *Brit YB Int'l L* 229.
[14] Fitzmaurice (1951) *Brit YB Int'l L* 8.
[15] Fitzmaurice (1957) *Brit YB Int'l L* 209.
[16] 209.

The Vienna Convention applies to all treaties concluded between states, with treaties referring to an "international agreement concluded between States … whether embodied in a single instrument or in two or more related instruments". [17] Thus, it applies to the ICCPR, ICESCR, CEDAW, and the CRC under the international system, the ECHR, ESC and the ESC(r) under the European system, the ADRDM, ACHR, Protocol of San Salvador, and the Convention of Belém do Pará under the inter-American system, and the ACHPR, ACRWC and the Maputo Protocol under the African system. Thus, the Vienna Convention guides the teleological approach utilised here. Article 31 of the Vienna Convention enshrines the general rule of interpretation applicable to the interpretation of treaties. According to the Vienna Convention:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[18]

Upon first glance, the Vienna Convention seems to require a textual approach to interpretation which focuses on giving effect to the meaning of the text as it stands. However, various authors argue that the Vienna Convention does not prefer a textual approach above an "intention of the parties" approach or a teleological approach.[19] Rather, the approach is a compromise between the textual, 'intention of the parties', and the teleological approaches.[20] Article 31(1) can be split into three sections: treaties must be interpreted (i) "in accordance with the ordinary meaning given to the terms of the treaty"; (ii) "in their context"; and (iii) "in the light of its object and purpose".[21]

According to Villiger, "[t]he ordinary meaning is the starting point of the process of interpretation".[22] This means that the object and purpose must be determined with reference to the terms used in the text and their normal meaning. However, the terms must be considered "in their context".[23] This is because "[t]reaty terms are not drafted in isolation", and their

[17] Articles 1 and 2(a) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331.
[18] Articles 31(1).
[19] Amin (2017) 36; JM Sorel & V Boré Eveno "Article 31 Convention of 1969" in O Corten & P Klein (eds) *The Vienna Convention on the Law of Treaties: A Commentary Vol 1* (2011) 804 808; Villiger *Commentary* 435-436.
[20] DS Jonas & TN Saunders "The Object and Purpose of a Treaty: Three Interpretative Methods" (2010) 43 *Vanderbilt J Transnat'l L* 565 578; Sorel & Boré Eveno "Article 31 Convention of 1969" in *The Vienna Convention on the Law of Treaties: A Commentary* 808; Villiger *Commentary* 426-429.
[21] Article 31(1) of the Vienna Convention.
[22] Sorel & Boré Eveno "Article 31 Convention of 1969" in *The Vienna Convention on the Law of Treaties: A Commentary* 829; Villiger *Commentary* 426.
[23] Article 31(1) of the Vienna Convention.

meaning can only be determined by considering the entire treaty text".[24] Article 31(2) indicates the aspects that must be considered to determine the context of treaties:

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".[25]

Based on the above, the treaty text, preamble and annexes are relevant contextual aspects that must be considered when determining the object and purpose of a treaty. In this regard, Sorel and Boré Eveno refer to these aspects as the internal context of a treaty.[26] They further indicate that the context can also be understood as referring to how the parties envisaged the particular provision or treaty text. In this sense, the 'intention of the parties' becomes relevant.[27]

Article 31(2) also refers to "any agreement relating to the treaty" and "any instrument which was made by one or more parties in connection with the conclusion of the treaty".[28] Considering "any agreement relating to the treaty", Villiger states that such an agreement can pertain to the implementation of the treaty or the interpretation of a particular term.[29] Concerning "any instrument which was made by one or more parties in connection with the conclusion of the treaty", Villiger argues that these instruments refer to "agreements *inter se* between certain parties or unilateral statements, *e.g.*, interpretative declarations upon ratification or accession".[30] Importantly, any agreement or instrument must be accepted or agreed to by all the other parties to the treaty for it to be valid.[31]

Article 31(3) provides for aspects that must be taken into consideration together with the context in the interpretation of treaties:

> "There shall be taken into account, together with the context: (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties

[24] Villiger *Commentary* 427.
[25] Article 31(2) of the Vienna Convention.
[26] Sorel & Boré Eveno "Article 31 Convention of 1969" in *The Vienna Convention on the Law of Treaties: A Commentary* 823.
[27] 824.
[28] Article 31(2) of the Vienna Convention.
[29] Article 31(2); Villiger *Commentary* 430.
[30] 430.
[31] 429.

> regarding its interpretation; (*c*) any relevant rules of international law applicable in the relations between the parties".[32]

Sorel and Boré Eveno further refer to these aspects as the external context of a treaty.[33] Since reference is made to "subsequent agreement" or "subsequent practice", these agreements or practices are necessarily agreed upon or established after the conclusion of a treaty.[34] Article 31(3) also includes "any relevant rules of international law applicable in the relation between the parties".[35] The rules of international law refer to those sources which are set out in the Statute of the International Court of Justice.[36] Furthermore, recourse can only be made to applicable rules of international law, that is, binding rules.[37] Importantly, rules of international law can only be taken into account together with the context insofar as it assists with the interpretation of treaty terms.[38] Finally, Article 31(4) also provides for giving effect to where parties envisaged a term to have a particular meaning. In general, this provision does not provide issues and will therefore not be further discussed.

Based on the discussion above, treaties must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context".[39] However, as was mentioned above, a treaty must also be interpreted "in light of its object and purpose".[40] Whereas Article 31(2) concerns the context of treaties, there is no explicit guidance as to where the object and purpose can be found or what it means.[41] Jonas and Saunders, referring to Buffard and Zemanek, state that object and purpose refer to the essential elements of a treaty.[42] Despite no explicit guidance as to where the object and purpose of treaties can be found, the argument presented is that this general rule of interpretation does indeed provide guidance. The same aspects that determine the context can also be used to determine the object and purpose of treaties. In this regard, it is necessary to consider Fitzmaurice's argument that the object and purpose of a treaty can be found in its preamble.

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[32] Article 31(3) of the Vienna Convention.
[33] Sorel & Boré Eveno "Article 31 Convention of 1969" in *The Vienna Convention on the Law of Treaties: A Commentary* 825.
[34] Article 31(3) of the Vienna Convention; Villiger *Commentary* 431.
[35] Article 31(3) of the Vienna Convention.
[36] Article 38 of the Statute of the ICJ.
[37] Villiger *Commentary* 433.
[38] 432.
[39] Article 31(1) of the Vienna Convention.
[40] Article 31(1).
[41] Jonas & Saunders (2010) *Vanderbilt J Transnat'l L* 567; Villiger *Commentary* 428.
[42] Jonas & Saunders (2010) *Vanderbilt J Transnat'l L* 567 and 578.

The discussion above illustrated that in the interpretation of treaties, the Vienna Convention favours a combined process. In the interpretation of treaties, terms shall be given their ordinary meaning (textual approach) and be viewed in the context ('intention of the parties' approach) that it is being used with due regard to the object and purpose of the instrument (teleological approach).[43] The general rule of interpretation allows recourse to the preamble and annexures of treaties, as well as agreements concluded, or instruments made, between parties related to a treaty. It further allows consideration of whether the parties agreed to the meaning of a particular term, whether subsequent agreements were concluded, or subsequent practices were established, as well as relevant rules of international law. In these references, the teleological approach to the interpretation of treaties is codified in the Vienna Convention. In the interpretation of treaties, the aim is arguably to give effect to its true object and purpose. The Vienna Convention, therefore, illustrates a conviction that the object and purpose are best determined through considering various aspects that can reveal it.

3 2 2 2 Article 32: Supplementary means of interpretation

Article 32 of the Vienna Convention provides that:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable".[44]

Article 32 allows interpreters to consider "supplementary" means in order to help "reveal or confirm the meaning of a provision".[45] This means that recourse may only be had to these means where Article 31 was insufficient to determine the object and purpose of a treaty or treaty provision; that is, where the meaning is ambiguous or obscure, or where "he or she is confronted with two contradictory interpretations".[46] Furthermore, no reference is made to which means must be utilised; therefore, the interpreter has the discretion to determine which would be of most assistance.[47]

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[43] Article 31(1) of the Vienna Convention.
[44] Article 32.
[45] Le Bouthillier "Article 32 Convention of 1969" in *The Vienna Convention on the Law of Treaties: A Commentary* 851.
[46] 849; Villiger *Commentary* 446-447.
[47] 851.

Article 32 mentions both "the preparatory work of the treaty and the circumstances of its conclusion" as examples of aspects to consider in determining the object and purpose of a treaty.[48] The preparatory work refers to the documents "generated by the parties during the treaty's preparation up to its conclusion".[49] The value of the preparatory work, as supplementary means, lies in its illustration of the exact intention of the parties throughout the process. Article 32 also refers to the circumstances that existed at the time of a treaty's conclusion. These circumstances are the broad social, political, and cultural factors that existed at the time the treaty was concluded and that could have had an impact on its formulation.[50]

Article 32 further entrenches the teleological approach to interpretation. As stated above, in the interpretation of treaties, the aim is to give effect to its true object and purpose. Thus, the Vienna Convention illustrates a conviction that the object and purpose are best determined through considering various aspects that can reveal it.

3 2 3 The relevance and value of the teleological approach

The significance of the teleological approach for purposes of this research lies in its potential to be utilised in the interpretation of international, European, inter-American, and African human rights law. The formulation provided in the Vienna Convention enables an interpretation of relevant provisions that goes beyond what is included in the text. The argument presented in this dissertation is that the teleological approach is the most appropriate method of interpretation of law to protect children with non-heteronormative SOGIE. This is based on the premise that the teleological approach allows consideration of the provisions of these instruments in light of their purpose with guidance from what lies outside the text of their provisions. This is important because, as indicated under 1, there is no explicit reference to SOGIE or related terms in the international, European, inter-American, and African human rights instruments. The potential role of the preamble, annexures and other elements of the treaties under discussion in facilitating the development of the law as to provide explicit protection for diverse SOGIE rights in education will be expanded on in more detail under chapter 4.

[48] Article 32 of the Vienna Convention.
[49] Villiger *Commentary* 445.
[50] 445.

3 3 The principle of universality

3 3 1 The principle of universality

The UDHR was adopted in 1948 against the backdrop of the atrocities committed in the Second World War and forms the foundation of current international human rights norms.[51] The Preamble of the UDHR recognises that all human beings are equal and are born with certain inalienable rights.[52] This enshrines the notion that human rights are universal, meaning that all human beings are entitled to the rights contained in the UDHR regardless of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[53]

Since the adoption of the UDHR, various understandings of universalism have emerged. This section outlines some of these understandings in an attempt to elucidate the notion that human rights are universal. The aim is also to shed light on the universalism/cultural relativism debate, which is of particular importance in the context of the interpretation and application of rights within the African regional human rights law system.

The universality of human rights means that all persons have certain rights by virtue of being human. This understanding has various implications: (i) having human rights depends on being a human being; (ii) being a human being is "an inalterable fact of nature, not something that is either earned or can be lost"; (iii) based on this, human rights are inalienable; and (iv) because all human beings have human rights, these rights are held in equal measure.[54] Despite the argument that all human being are holders of certain rights, universal possession does not equal universal enforcement. Although human rights are viewed as universal, their enforcement depends on national implementation monitored by regional and international human rights bodies.[55]

The UDHR is binding upon all states as part of customary international law. It represents an agreement to universal human rights and illustrates a commitment to work towards the

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[51] MO Hinz "Human Rights Between Universalism and Cultural Relativism? The Need for Anthropological Jurisprudence in the Globalising World" in A Bösl & J Diescho (eds) *Human Righs in Africa* (2009) 3 3; S Răduleţu "Regional Human Rights Systems and the Principle of Universality" (2013) 37-38 *RSP* 283 283; M Rosenfeld "Can Human Rights Bridge the Gap between Universalism and Cultural Relativism – A Pluralist Assessment Based on the Rights of Minorities" (1999) 30 *Colum Hum Rts L Rev* 249 249.

[52] Preamble of the UDHR.

[53] Article 2.

[54] J Donnelly "The Relative Universality of Human Rights" (2007) 29 *Hum Rts Q* 281 282; Răduleţu (2013) *RSP* 284; Rosenfeld (1999) *Colum Hum Rts L Rev* 249.

[55] Donnelly (2007) *Hum Rts Q* 283; L H Hoffman "The Universality of Human Rights" *Judicial Studies Board Annual Lecture* (2009) 1 8; R Spano "Universality or Diversity of Human Rights – Strasbourg in the Age of Subsidiarity" (2014) 14 *Hum Rts L Rev* 487 492.

recognition, promotion and protection of these rights.[56] States further confirm their commitment through the ratification of international and regional human rights-related treaties.[57] Through its continuous reference to the UDHR, international and regional treaties confirm the general conviction that all human beings "possess as part of their birth right a core of inalienable rights".[58]

Since its relative unanimous adoption, non-Western nations have been questioning the notion of universal human rights and what it embodies. The argument often presented is that the UDHR reflects the "ideological patrimony of the West".[59] However, Ramcharan argues that the role of developing countries in the formulation and establishment of the UDHR is underestimated. He illustrates that in the drafting of the UDHR, developing countries outnumbered Western nations. Thus, the UDHR draws on "the intellectual patrimony of the peoples of the world".[60] In contrast, Donnelly argues that the US, central, and northern Europe had, and still has, a significant impact on the formulation of international human rights norms.[61] What is often forgotten is that despite developing countries participating in the formulation of the UDHR, most of these nations were still under colonial rule at that time.[62]

The continued political and economic dominance of the US, central, and northern European states enable them to exert pressure on developing nations to offer "formal endorsements of international norms advocated by leading powers".[63] As a result, some developing states have argued that certain human rights norms cannot find application in their societies as it conflicts with cultural values. This argument has arisen despite the acceptance of the UDHR and the ratification of related international and regional human rights treaties.[64] This has resulted in a debate as to how the rights contained in the UDHR should be interpreted in light of cultural relativism.

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[56] B G Ramcharan "A Debate About Power Rather Than Rights" (1998) 4 *IPG* 423 423.
[57] Donnelly (2007) *Hum Rts Q* 288; Ramcharan (1998) *IPG* 423; Hinz "Human Rights Between Universalism and Cultural Relativism?" in *Human Righs in Africa* (2009) 6; Răduleţu (2013) *RSP* 283.
[58] Ramcharan (1998) *IPG* 423; Răduleţu (2013) *RSP* 285.
[59] CM Cerna "Universality of Human Rights and Cultural Diversity" Implementation of Human Rights in Different Socio-Cultural Contexts" (1994) 16 *Hum Rts Q* 740 740; Hinz "Human Rights Between Universalism and Cultural Relativism?" in *Human Righs in Africa* (2009) 20; Rosenfeld (1999) *Colum Hum Rts L Rev* 249; A Stango "Human Rights Between Universalism and Cultural Relativism" (2014) 7 *Chorzowskie Studia Polityczne* 157 159.
[60] Ramcharan (1998) *IPG* 425; Stango (2014) *Chorzowskie Studia Polityczne* 160.
[61] Donnelly (2007) *Hum Rts Q* 291.
[62] Hinz "Human Rights Between Universalism and Cultural Relativism?" in *Human Rights in Africa* (2009) 4.
[63] Donnelly (2007) *Hum Rts Q* 291.
[64] 282; Rosenfeld (1999) *Colum Hum Rts L Rev* 249; Hinz "Human Rights Between Universalism and Cultural Relativism?" in *Human Righs in Africa* (2009) 6-7.

3 3 2 Cultural relativism and universal human rights

The rights contained in the UDHR are reiterated in international and regional treaties. The interpretation of these rights relates to the debate between the principle of universality and the impact of culture on how human rights are interpreted and applied.[65] To understand the impact of culture on the interpretation and application of international human rights norms, one must understand the concept of cultural relativism. In essence, cultural relativism refers to "a normative doctrine that demands respect for cultural differences".[66] According to Howard-Hassmann, cultural relativism often aims towards cultural absolutism, meaning that "[c]ulture provides absolute standards of evaluation; whatever a culture says is right (for those in that culture)".[67] In terms of a more absolutist perception of cultural relativism, the human rights norms contained in the UDHR, and reiterated in other international and regional treaties, has "no normative force in the face of divergent cultural traditions".[68]

In contrast with cultural relativism, various authors have asserted that culture is malleable.[69] According to Donnelly, cultures change across time and space: they are not "coherent, homogenous, consensual and static".[70] Thus, the argument that a cultural practice or value can be either compatible or incompatible with a particular human rights norm cannot hold. The following statement provides insight into this argument:

> "All major civilizations have for long periods treated a significant portion of the human race as 'outsiders' not entitled to guarantees that could be taken for granted by 'insiders.' Few areas of the globe, for example, have never practiced and widely justified human bondage. All literate civilizations have for most of their histories assigned social roles, rights, and duties primarily on the basis of ascriptive characteristics such as birth, age, and gender. Today, however, the moral equality of all human beings is strongly endorsed by most leading comprehensive doctrines in all regions of the world. This convergence, both within and between civilizations, provides the foundation for a convergence on the rights of the Universal Declaration".[71]

Based on the above, the acceptance or celebration of particular practices in the past does not justify its continuation in the present. Cultures and societies develop in terms of what is

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[65] Ramcharan (1998) *IPG* 423.
[66] Donnelly (2007) *Hum Rts Q* 294.
[67] EH Howard "Cultural Absolutism and the Nostalgia for Community" (1993) 15 *Hum Rts Q* 315 quoted in Donnelly (2007) *Hum Rts Q* 294.
[68] Donnelly (2007) *Hum Rts Q* 294.
[69] 296; Hinz "Human Rights Between Universalism and Cultural Relativism?" in *Human Righs in Africa* (2009) 19; Stango (2014) *Chorzowskie Studia Polityczne* 163.
[70] Donnelly (2007) *Hum Rts Q* 294 and 296.
[71] 291.

rendered acceptable at a particular point in time. At this moment, there is general agreement between states that the UDHR enshrines fundamental human rights norms and that all human beings are entitled to these rights. This can be seen in the wide ratification of regional and international human rights treaties.

According to Donnelly, there are general problems with the utilisation of an absolutist perception of cultural relativism to circumvent compliance with established human rights norms. Firstly, there are diverse ways in which one culture can be prescribed to or practiced. This indicates that cultural values cannot be endorsed or be representative of the moral experience of all people subscribing to that culture. Secondly, cultural relativism is often used to endorse intolerance towards other cultures or ideas that do not correlate with the practices and values of that culture. This in turn can lead to behaviour that infringes on the fundamental human rights of persons outside that culture.[72] Thirdly, cultural relativism often confuses politics and culture. Thus, the state can utilise culture in support of their policies. In this sense, "what a people has been forced to tolerate [is confused] with what it values".[73] The final general problem with the utilisation of cultural relativism to circumvent compliance with established human rights norms relates to how the "cultures described are idealized representations of a past that, if it ever existed, certainly does not exist today".[74] Donnelly argues that arguments of cultural relativism do not consider the impact of colonialism, globalisation and ideas of human rights on the development of those cultures.[75]

Despite these general problems, cultural relativism remains relevant in the current interpretation and implementation of human rights. This is of particular importance when considering the broad formulation of certain human rights provisions. The broad formulation of the rights contained in the UDHR and reiterated in regional and international human rights treaties provide scope for diverse interpretation and implementation.[76] Furthermore, the lasting impact of colonialism on previously-colonised nations is also important when considering arguments in support of cultural relativism: "[a]nything that even hints of imposing Western values is likely to be met with understandable suspicion, even resistance".[77] Against this backdrop, this chapter proceeds by setting out how cultural relativism impacts the reading of

[72] 295.
[73] 296.
[74] 296.
[75] 296.
[76] 299.
[77] 304.

the rights of persons with non-heteronormative SOGIE under the African, European and inter-American human rights systems.

3 3 3 Cultural relativism and universal human rights under the African-, Inter-American-, and European human rights systems

Regardless of the argument that an absolutist perception of cultural relativism cannot hold considering the fact that cultures are indeed relative, provision has nonetheless been made for considering cultural and societal differences when interpreting human rights. The 1993 UN World Conference occurred against the backdrop of this debate. At the Conference, Western states accepted that, despite the conviction that human rights are universal, it is amenable to an interpretation that considers regional social and cultural differences.[78] The Vienna Declaration and Programme of Action was adopted at the Conference and confirms that:

> "While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms".[79]

Despite the wide ratification of the UDHR and the subsequent adoption of the Vienna Declaration and Programme of Action, certain provisions relating to the private sphere of individuals have still not been accepted as universal. These include rights concerning religious and cultural matters, the status of women and the protection of children, the right to get married and divorced, as well as choices regarding family planning. However, these are the domains "in which the most serious challenges to the universality of human rights arise".[80]

According to Cerna, human rights pertaining to the private sphere have not garnered universal acceptance because societies have their own codes of conduct. These codes are informed by religion or tradition which inform, for example, the status of women and the protection of minority rights.[81] Because non-Western nations argue that the current understanding of human rights stems from Western ideologies, Cerna contends that regional human rights systems are perhaps better situated to foster compliance with international human

[78] Cerna (1994) *Hum R Q* 741.
[79] Para 5 of the Vienna Declaration and Programme of Action.
[80] Cerna (1994) *Hum R Q* 746.
[81] 749.

rights norms.[82] This argument is based on regions often having "a shared history, geography, and, in some cases, language and religion, as well as a commonality of values".[83] Thus, regional systems have the potential to foster compliance with international human rights law in a manner that gives due consideration to regional peculiarities.[84] In this regard, this sub-section will briefly touch upon the ACHPR, the ECHR, and the ADRDM as the foundational human rights documents of the African, European, and inter-American human rights systems respectively. A detailed discussion of the ACHPR, ADRDM, ECHR, as well as related documents, is presented under chapters 5 to 7.

The ACHPR refers to the UDHR in its Preamble. The ACHPR undertakes to "achieve a better life for the peoples of Africa".[85] In this, the Organisation of African Unity ("OAU") aims to give effect to the Charter of the United Nations ("UN Charter") and the UDHR.[86] The ACHPR enshrines both the principle that human rights are universal, as well as that the diverse cultures and peoples of Africa must be taken into consideration in the application of universal human rights. The Preamble confirms "that fundamental human rights stem from the attributes of human beings which justifies their national and international protection". However, the "values of the African civilization" must be taken into consideration in the interpretation and application of human and peoples' rights.[87] Similarly, the ADRDM recognises that human rights are universal. In its Preamble, it provides that "all men are born free and equal in dignity and in rights".[88] Its Preamble also refers to the place of culture in American societies, stating that "it is the duty of man to preserve, practice and foster culture by every means within his power".[89] The ECHR, like the ACHPR and the ADRDM, indicates a commitment to the collective enforcement of the universal rights contained in the UDHR. Unlike the ACHPR and ADRDM, there is no explicit reference to culture. The ECHR simply refers to "a common heritage of political traditions, ideals, freedom and the rule of law" that must guide the enforcement of the rights contained therein.[90] The references to the principles of customary international law set out under the UDHR in the Preambles of these instruments illustrate that it favours a teleological interpretation. These instruments require that, in giving effect to its

[82] Cerna (1994) *Hum R Q* 749; Ramcharan (1998) *IPG* 425.
[83] Cerna (1994) *Hum R Q* 749.
[84] 752.
[85] ACHPR, preamble.
[86] ACHPR, preamble.
[87] ACHPR, preamble.
[88] ADRDM, preamble.
[89] ADRDM, preamble.
[90] ECHR, preamble.

purpose of ensuring equal rights for all without discrimination, consideration be given to what lies outside the text.

From this discussion, it is clear that the European, inter-American, and African human rights systems enshrine the concept of universal human rights. Whereas the ACHPR and the ADRDM include explicit references to culture, the same cannot be said of the ECHR. The ACHPR is also unique in that it refers to a specific focus on the consideration of African values in the interpretation and application of international human rights norms. As was illustrated at the end of the discussion in part 1 1 above, the current interpretation of provisions in the ACHPR does not provide adequate protection to persons with non-heteronormative SOGIE. In this regard, the interpretation of the various human rights instruments of the international, European and inter-American systems become relevant to guide the interpretation of the ACHPR, ACRWC, and the Maputo Protocol. A comparative study allows the exploration and evaluation of developments in the international, European and inter-American systems, and consideration of which can find successful application in the African system.

3 4 Concluding remarks: the value of a teleological approach for the interpretation of the right to education of children with non-heteronormative SOGIE

The comparative approach, as discussed under 1 3 ties in with the teleological approach to interpretation in that, like the comparative approach, the teleological approach too requires consideration of the underlying internal legal sources. The Vienna Convention sets out the teleological interpretation for treaties. In terms of this approach, a treaty should be interpreted in good faith and in accordance with the ordinary meaning of its terms. Importantly, a treaty should be interpreted in light of its objects and purpose. In this regard, the Vienna Convention provides accepted tools that can be used to reflecti on sources that are related to the treaty but go beyond the text thereof. Considering the similar objects and purpose of the international and regional human rights instruments under discussion, the principle that human rights are universal, is valuable when reflecting on the development of the law in light of changing societal values and how cultural factors can influence the interpretation and application of certain fundamental rights. A comparative approach, like an approach based on the principle that human rights are universal, provides scope within which to determine how cultural factors influence a legal system and how it can ultimately impact on the interpretation and application of fundamental rights.

These reform-oriented approaches to legal research provide an opportunity to go beyond the law as found in its traditional sources. In doing so, the approach set forth aims to establish whether the law and reality are one. Often it is found, as hypothesised under 1, that there is a discrepancy between the law as it is, and the law as it could or should be. This multifaceted approach aims to bridge the gap between the law as it is currently interpreted, and how it could or should be interpreted as to provide substantive protection to children with non-heteronormative SOGIE's right to education under the African regional human rights systems.

4 The right to education of children with non-heteronormative SOGIE under international human rights law

4 1 Introduction

The principal research question that this dissertation is concerned with is whether the right to education as provided under the ACRWC, read together with the ACHPR and the Maputo Protocol, enable children with non-heteronormative SOGIE equal access to and enjoyment of education as children who identify with heteronormative and binary conceptions of sex and gender. Similar to the African regional human rights instruments under discussion, the international instruments do not include explicit protection of the right to education of children with non-heteronormative SOGIE.

Based on the principle of universality, discussed under 3 3, the assumption is that the right to education of children with non-heteronormative SOGIE is indeed protected under international law. In this regard, how the right to human dignity, equality, and non-discrimination, as well as the best interest principle as foundational human rights, can enhance the right to education is analysed. The purpose is to illustrate that international law demands a teleological interpretation of the right to education and that this interpretation protects children with non-heteronormative SOGIE in the context of education. Thus, this approach does not require the establishment of new rights but aims to show that existing rights find equal application to children with non-heteronormative SOGIE.

4 2 UDHR

4 2 1 Introduction to the UDHR

The UN was established in 1945 against the backdrop of the atrocities committed during the First and Second World Wars.[1] As a result, there was support from the Member States of the UN to include an international bill of rights in the UN Charter.[2] Despite this support, the UN Charter does not include an international bill of rights. The UN Charter does, however, refer to the purpose of the UN, which is to "achieve international cooperation … in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[3] In this sense, the UN Charter contains the first element

[1] Preamble to the UN Charter.
[2] J Morsink *Universal Declaration of Human Rights: Origins, Drafting and Intent* (1998) 1.
[3] Article 1(3) of the UN Charter.

of the intention of the drafters of the UDHR: to enshrine the equal rights of all persons to ensure that the atrocities committed against humankind during the two World Wars are not repeated.

The UN Charter lists the Economic and Social Council ("ECOSOC") as one of the principal organs of the UN,[4] and empowers it to "set up commissions in economic and social fields and for the promotion of human rights".[5] To this end, the Commission of Human Rights was established in 1946 and tasked with drafting an international bill of rights.[6] The work of the Commission of Human Rights culminated in the adoption of the UDHR on 10 December 1948 with a vote of 48 to 0, with eight abstentions.[7] Seeing as the UDHR was a culmination of hundreds of proposals from governments and individuals, as well as discussions amongst member states, the general opinion of the UN member states was that the UDHR was universal and cross-cultural.[8]

Since its adoption, various states outside Central Europe and North America – often referred to as the collective "West" – have questioned the notion of universal human rights and whether the UDHR indeed embodies it. As discussed under chapter 3, Cerna argues that the UDHR reflects the "ideological patrimony of the West".[9] Considering its historical context, An-Na'im explains that the drafters could not prevent producing a document "based on Western cultural and philosophical assumptions".[10] The UDHR's standards were formulated within the context of the Allied nations of the Second World War wanting to prevent the human rights violations perpetrated under the Nazi-regime from happening again. As a result, the fundamental standard that underpins the UDHR is that all persons are equal in dignity and rights and deserve equal respect and concern for these rights without distinction. Thus, at its core is respect for the freedom, equality, and human dignity of all persons.[11]

A counter argument to the criticism of the UDHR presented is that Chile, China, Lebanon, the USA, and the USSR were the most influential states during the drafting of the UDHR.[12] These states display diverse social, economic, cultural and historical contexts and, therefore, represent diverse perspectives on what an international bill of rights should look like. However,

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[4] Article 7.
[5] Article 68.
[6] ECOSOC "Report of the Committee on the Organisation of the Economic and Social Council" (15 February 1946) E/20 para 2.
[7] UNGA "Verbatim Record of the Hundred and Eighty-Third Plenary Meeting" (10 December 1948) A/PV.183 933. See also, WA Schabas *Universal Declaration of Human Rights* (2013) cix and cxi.
[8] UNGA "Verbatim Record of the Hundred and Eightieth Plenary Meeting" (9 December 1948) A/PV.180 858.
[9] CM Cerna "Universality of human rights and cultural diversity: implementation of human rights in different socio-cultural contexts" (1994) 16 *HRQ* 740 740.
[10] A An-Na'im *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (1992) 427-428.
[11] Preamble of the UDHR.
[12] Morsink *UDHR: Origins, Drafting and Intent* x.

the question nonetheless arises as to whether the 48 states that voted in favour of the UDHR can be viewed as setting forth a universal and cross-cultural standard of human rights. This is significant when considered in light of the fact that these 48 states represent just short of a quarter of the now 193 UN Member states.[13] Thus, although the intention of the drafters was for the UDHR to be a universal and cross-cultural instrument with the drafters believing that this aim was achieved, the foundation of their intentions was somewhat misguided based on the limited number of states involved. As a result, it is perhaps more relevant to consider whether the UDHR can be perceived as a universal and cross-cultural instrument today, rather than at that point in time.

States accept the obligations enshrined in the UN Charter upon becoming a member of the UN.[14] These obligations are concerned with maintaining international peace by developing positive relationships between nations to achieve "international cooperation in solving international problems".[15] Furthermore, these obligations include fostering respect for the rights and fundamental freedoms of all persons without distinction.[16] At the outset, it must be noted that states cannot accede to the UDHR. Rather, upon becoming a UN member, states indicate their support of the rights proclaimed in the UDHR as an extension of the UN Charter. Thus, in being granted membership to the UN, states have to, at least to some extent, accept that the UDHR "distil those fundamental rights and freedoms of the individual that most members of the United Nations would regard as universal".[17]

As a declaration, the UDHR is not a binding instrument. Rather, it proclaims rights in broad terms.[18] The UDHR sets out "basic principles of inalienable human rights" and a "common standard of achievement for all peoples and all nations" as guidelines for state conduct.[19] These principles have broadly been accepted as customary international law.[20] Despite not being a binding instrument, the UDHR nonetheless has considerable weight. In this regard, it is significant that the human rights treaties under discussion in this chapter refer to the UDHR in their Preambles and largely mirror the wording of the UDHR in their provisions. In this sense,

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[13] United Nations "Member States" *United Nations* <https://www.un.org/en/member-states/> (accessed: 02-07-2019).
[14] Article 4 of the UN Charter.
[15] Article 1(1)-(3).
[16] Article 1(2)-(3).
[17] V Pechota "The Development of the Covenant on Civil and Political Rights" in L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 32 43.
[18] Morsink *UDHR: Origins, Drafting and Intent* 15.
[19] Commission of Human Rights "Summary Record of the Eighty-Ninth Meeting [of the Third Committee]" (30 September 1948) A/C.3/SR.89. See also, Schabas *UDHR* cvii.
[20] RMM Wallace & O Martin-Ortega *International Law* (2013) 7 ed 246.

the UDHR provides interpretative value in understanding and giving context to subsequent treaties adopted under the auspices of the UN. As a result, there is a constant cross-referencing between a right declared in the UDHR and its corresponding right contained in one of the subsequent treaties under discussion. Therefore, the UDHR forms the foundation of these rights and provides the historical context in light of which it must be understood and developed.

Because the UDHR is a declaration, it does not have an implementation mechanism tied to it. The implementation bodies of the ICCPR, ICESCR, UNCRC, as well as CEDAW, give further content to the rights contained in these respective treaties. In doing so, these bodies also provide guidelines for understanding the rights set forth under the UDHR because these treaties were adopted with the UDHR in mind. The Preamble of the UDHR reflects the purposes and principles of the UN, as set out in the UN Charter. As discussed below, there are two foundational standards reflected in the Preamble that underlie the text of the UDHR. First, all persons are equal in dignity and rights,[21] and second, states are obliged to promote, respect, and observe human rights.[22]

4 2 2 Human dignity as an underlying value

The Preamble to the UN Charter recognises and affirms the inherent dignity and worth of all persons.[23] The Preamble to the UDHR reiterates this, with Article 1 of the UDHR stating that "[a]ll human beings are born free and equal in dignity and rights".[24] According to McCrudden, the reference to human dignity in the UN Charter motivated its inclusion in the UDHR.[25] The significance of Article 1 is clear from the time spent on its drafting.[26] Part of the discussion was on whether human dignity should be a separate substantive right or whether it should be part of the Preamble as a guiding principle. In the end, 26 to six states were in favour of including human dignity as a separate substantive right.[27] As such, Lindholm explains that the United Nations General Assembly ("UNGA") viewed it as of "pivotal importance", further emphasised through its placement as the first substantive provision.[28] The idea that all persons

[21] Para 1 of the Preamble to the UDHR.
[22] Para 6.
[23] Para 2 of the Preamble to the UN Charter.
[24] Article 1 of the UDHR.
[25] C McCrudden "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *EJIL* 655 677.
[26] T Lindholm "Article 1" in G Alfredsson & A Eide (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 41 52: There were "six full meetings of at times heated discussion, and frequent mention in the general debate" concerning the formulation of this right.
[27] 55.
[28] 55.

have inherent and equal human dignity, whether or not this is recognised by the state or by others, has been accepted as a "fundamental statement of fact".[29] Thus, human dignity has become central to the human rights discourse.[30]

The UDHR is the foundational instrument of international human rights and influenced the formulation of subsequent international and regional human rights treaties. As a result, because human dignity was included in the Preamble and the main text of the UDHR, it has been adopted as the underlying principle of subsequent treaties, as discussed throughout this chapter.[31] Despite recognition of and respect for human dignity being central to the human rights discourse, it is unclear what human dignity means as the concept does not lend itself to a clear definition.[32]

The ICJ has referred to human dignity in its judgments and opinions, indicating the centrality of human dignity to other human rights.[33] In a separate opinion on the advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Vice-President Ammoun asserted that most human rights flow from the right to human dignity as set forth in the UDHR.[34] Furthermore, in a separate opinion on the judgment on *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Cançado Trindade J referred to the international law obligation on states to protect human rights based on respecting the human dignity of all persons.[35] Both these separate opinions illustrate the understanding that human dignity provides the "basis for human rights in general" and is a "key argument to why human beings should have rights, and what the limits of these rights may be".[36]

The reports of the special rapporteurs and independent experts of the United Nations Human Rights Council ("Human Rights Council") have provided some guidance on how human dignity frames other fundamental rights. Of relevance are the comments made in relation to the right to non-discrimination, health, and education. Concerning discrimination, the report of the Independent Expert on Protection against Violence and Discrimination based on Sexual

[29] 59.
[30] McCrudden (2008) *EJIL* 656.
[31] See the text to parts 4 3 2, 4 4 2, 4 5 2, and 4 6 2.
[32] McCrudden (2008) *EJIL* 678.
[33] The ICJ has primarily referred to human dignity in relation to the prohibition of torture or inhumane or degrading treatment or punishment. See, *Marshall Islands v United Kingdom* (Judgement) ICJ Rep 2016 833; *Croatia v Serbia* (Judgement) ICJ Rep 2015 3; *Republic of Guinea v Democratic Republic of the Congo* (Advisory Opinion) ICJ Rep 2010 639; *Bosnia and Herzegovina v Serbia and Montenegro* (Judgement) ICJ Rep 1996 595.
[34] *South West Africa* (Advisory Opinion) ICJ Rep 1971 77.
[35] *Belgium v Senegal* (Judgement) ICJ Rep 2012 508.
[36] McCrudden (2008) *EJIL* 680.

Orientation and Gender Identity is significant.[37] There it was stated that denying the rights of persons with non-heteronormative SOGIE through violence and discrimination "violates the dignity of victims and is offensive to the global conscience".[38] In this context, the right to human dignity requires states to ensure that persons with non-heteronormative SOGIE are accorded the same rights as all other persons.

Considering the right to health, the Special Rapporteur on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health explained that the "survival, protection, growth and development of children in good physical and emotional health are the foundations of human dignity and human rights".[39] This statement speaks to the report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, where human dignity was tied to both self-worth and mental health.[40] In these reports, the Human Rights Council establishes that respect for human dignity encompasses the developmental aspects of the right to health and is tied to a person's perception of themselves. The Special Rapporteur on the Right to Education has further indicated that human dignity "implies respect for the individual, in [their] actuality and also in [their] potential".[41]

Based on this brief discussion, the Human Rights Council adds the following to the meaning of human dignity under the UDHR. First, human dignity requires respect for all persons without discrimination. Respect includes refraining from infringing on other person's rights through discrimination and further obligates states to ensure that all persons are afforded equal rights. Second, human dignity is tied to self-worth, which in turn is tied to a person's overall health, development, and their ability to be an active member of their society. The Human Rights Council's Thematic Study on the Right of Persons with Disabilities in Education illustrate both these elements.[42] With specific reference to what human dignity requires in the context of the right to education, the Human Rights Council stated that the right to education refers to the

[37] Commission of Human Rights "Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity" (11 May 2018) A/HRC/38/43.
[38] Para 86. See also part 4 2 3.
[39] Human Rights Council "Report of the United Nations High Commissioner for Human Rights on the right of the child to the enjoyment of the highest attainable standard of health" (4 December 2012) A/HRC/22/31 para 3.
[40] Human Rights Council "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover" (27 April 2010) A/HRC/14/20 paras 7 and 19.
[41] Human Rights Council "The right to education of persons in detention, Report of the Special Rapporteur on the right to education, Vernor Muñoz" (2 April 2009) A/HRC/11/8 para 18.
[42] Human Rights Council "Thematic study on the right of persons with disabilities to education, Report of the Office of the United Nations High Commissioner for Human Rights (18 December 2013) A/HRC/25/29.

right to an inclusive education which "values students as persons, respects their inherent dignity and acknowledges their needs and their ability to make a contribution to society".[43]

Neither the ICJ, nor the Human Rights Council, provide a comprehensive definition or list of elements of what constitutes human dignity. Therefore, McCrudden's research is of value in setting forth a basic minimum core of comprising three elements, namely an ontological, relational, and limited-state element.[44] According to the ontological element, "every human being possesses an intrinsic worth, merely by being human".[45] The relational element adds that "this intrinsic worth should be recognized and respected by others".[46] This requires others to act in a particular manner or refrain from particular conduct. In terms of the limited-state element, states "exist for the sake of the individual human being, and not vice versa".[47] In light of the discussion undertaken here, these elements clearly represent what has become a general understanding of human dignity.[48]

4 2 3 Non-discrimination

As mentioned above, the UN Charter is the first international instrument to refer to the equal rights of all persons without distinction.[49] Articles 2 and 7 of the UDHR provides a more comprehensive right to non-discrimination and equality than the UN Charter.[50] The essence of these provisions is that all persons are entitled to the rights set forth in the UDHR without distinction and that all persons are equal before the law and have equal protection of the law.[51] Article 2 does not list discrimination based on non-heteronormative SOGIE as prohibited

[43] Para 7.
[44] McCrudden drew insight from Neuman in setting forth the three minimum core elements. See, G Neuman "Human Dignity in United States Constitutional Law" in D Simon & M Weiss (eds) *Zur Autonomie des Individuums: Liber Amicorum Spiros Simitis* (2000) 249 249-250.
[45] McCrudden (2008) *EJIL* 679.
[46] 679.
[47] 679.
[48] See the text to parts 4 3 1, 4 4 1, 4 5 1, and 4 6 1.
[49] See the text to 4 2 1.
[50] Article 2 of the UDHR provides that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such … sex … or other status". Article 7 states that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against *any incitement to such discrimination*" [*own emphasis*].
[51] According to Skogly, Article 2 applies to all the rights contained in the UDHR and is derived from the principle of equality. Furthermore, Skogly explains that the wording of Article 2 implies that "differential treatment, due to the special features of a person or of the group to which a person belongs, is not in accordance with the principle of equality in rights". See, S Skogly "Article 2" in G Alfredsson & A Eide (eds) *The Universal Declaration of Human Rights* (1999) 75 75 & 87.

grounds.[52] However, both the Office of the High Commissioner of Human Rights ("OHCHR") and the Human Rights Council has indicated that discrimination based on non-heteronormative SOGIE is prohibited under "sex" or "other status".

Resolution 17/19 was the first resolution adopted by the Human Rights Council to address the human rights of persons with non-heteronormative SOGIE.[53] However, Brazil proposed a resolution on human rights and sexual orientation to the Human Rights Council in 2003 already.[54] Between 2005 and 2011, four joint statements were presented to the Human Rights Council on behalf of states from all UN regions. These statements expressed concern over the human rights violations perpetrated against persons based on their non-heteronormative SOGIE and how this infringes on the right to non-discrimination and other universal human rights, such as the right to life and health, as well as the right to be free from torture or inhuman or degrading treatment or punishment. Furthermore, these joint statements implored States to repeal legislation or administrative measures that penalise persons or impose criminal sanctions for their non-heteronormative SOGIE.[55] The first joint statement is significant as it indicates that sexual orientation is "an immutable part of self" and that forcing individuals to not live out "their sexual orientation, or to discriminate against them on this basis … is contrary to human dignity".[56]

Resolution 17/19 departs from the guarantee that all persons are entitled to the human rights set forth in the UDHR, ICESCR, and the ICCPR without distinction. In light hereof, the Human Rights Council expressed concern over the violence and discrimination perpetrated against persons based on their non-heteronormative SOGIE as a global phenomenon.[57] *Resolution 17/*19 concluded with a request to the OHCHR to commission research into discrimination

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[52] The use of "distinction" as opposed to "discrimination" in the UDHR is insignificant. Reference will be made to "discrimination" throughout this dissertation, as this term is the version used most often in the international and regional human rights treaties under discussion.

[53] Human Rights Council "Human rights, sexual orientation and gender identity" (14 July 2011) A/HRC/RES/17/19.

[54] E Baisley "Reaching the tipping point?: Emerging international human rights norms pertaining to sexual orientation and gender identity"(2016) 38 *HRQ* 134 149-150.

[55] Delivered by New Zealand "Joint statement on sexual orientation & human rights" (03-2015) ARC International <https://arc-international.net/global-advocacy/sogi-statements/2005-joint-statement/> (accessed 25-05-2019); Delivered by Norway "Joint statement: Human rights, sexual orientation and gender identity" (01-12-2006) *ILGA* <https://ilga.org/statement-by-norway-unhrc-2006> (accessed 25-05-2019); Delivered by Argentina "Joint statement on human rights, sexual orientation and gender identity" (18-12-2008) *ARC International* <https://arc-international.net/global-advocacy/sogi-statements/2008-joint-statement/> (accessed 26-05-2019); UNHRC "Joint statement on ending acts of violence related human rights violations based on sexual orientation and gender identity" (22-03-2011) <https://www.refworld.org/docid/4eb8f32e2.html> (accessed 26-05-2019).

[56] Delivered by New Zealand "Joint statement on sexual orientation & human rights" (03-2015) *ARC International* <https://arc-international.net/global-advocacy/sogi-statements/2005-joint-statement/> (accessed 25-05-2019).

[57] Human Rights Council (14 July 2011) A/HRC/RES/17/19.

against persons based on their non-heteronormative SOGIE and the acts of violence committed against them as a result. The report was presented to the UNGA on 17 November 2011 and affirmed that various UN bodies support for the prohibition of discrimination based on non-heteronormative SOGIE.[58]

In its report, the OHCHR reiterated that the prohibition of discrimination based on non-heteronormative SOGIE stems from the founding principles of human rights law: that human rights are universal and that all human beings are equal and deserve equal respect for and protection of their rights. These two principles are founded on non-discrimination as the core of the international human rights regime. Regarding the work of the Human Rights Committee ("HRC"), the Committee on Economic, Social and Cultural Rights ("CESCR"), the Committee on the Rights of the Child ("CRC Committee"), as well as the Committee on the Elimination of Discrimination Against Women ("CEDAW Committee"), the report confirmed that the prohibited grounds of discrimination under the UDHR do not represent an exhaustive list. Rather, the reference to "other status" indicates the intention for the list to be added to, with the bodies mentioned having expanded the prohibited grounds of discrimination to include sexual orientation and gender identity.[59]

The report also indicated that, under international law, states are obliged to ensure that persons with non-heteronormative SOGIE are accorded equal rights to persons who find identification and expression within a heteronormative SOGIE framework. These obligations include ensuring that persons are not prevented from exercising rights based on their SOGIE in administrative processes or through legislation; that steps are taken to address discrimination against persons based on their SOGIE in all aspects of life; and that SOGIE-based discrimination and violence be prevented and addressed, with redress being provided in circumstances where it does occur.[60] In *Resolution 27/32*, the Human Rights Council welcomed the OHCHR's report, but expressed concern over the violence and discrimination that continues to be perpetrated against persons based on their non-heteronormative SOGIE in all regions.[61]

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[58] The UN entities referred to in the UNCHR report are the OHCHR, the United Nations Development Programme ("UNDP"), the United Nations Children's Fund ("UNICEF"), and the United Nations Educational, Scientific and Cultural Organization ("UNESCO"), amongst others. See, Human Rights Council "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity" (17 November 2011) A/HRC/19/41 para 3. See also, Vollmer *Queer families* 159.

[59] Human Rights Council (17 November 2011) A/HRC/19/41 paras 5-7. See the text to parts 4 3 3; 4 4 3; 4 5 3; and 4 6 4 of this Chapter.

[60] Paras 8-19.

[61] Human Rights Council "Human rights, sexual orientation and gender identity" (2 October 2014) A/HRC/RES/27/32.

Resolution 32/2 was adopted on 30 June 2016 and is significant for two reasons. First, it was established that cultural relativism has a place in international law, but that it cannot be used to undermine universal human rights norms.[62] In this regard, the Human Rights Council stressed the "importance of respecting regional, cultural and religious value systems" but indicated that having regard for these diversities does not allow imposing "concepts or notions pertaining to social matters" that will be detrimental to the international human rights regime as agreed upon.[63] Second, the Human Rights Council appointed an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity ("Independent Expert") for a period of three years, during which annual reports had to be presented to both the Human Rights Council and the UNGA.[64] Importantly, on 10 July 2019, the mandate was renewed for a further three years.[65] The Independent Expert is mandated to assess how international human rights instruments have been implemented to "overcome violence and discrimination against persons on the basis of their [non-heteronormative SOGIE]" and to "address the multiple, intersecting and aggravated forms of violence and discrimination" perpetrated against them.[66]

In the first two reports presented to the Human Rights Council, the Independent Expert summarised the core of the complex discourse surrounding the rights of persons with non-heteronormative SOGIE. At the one end of the spectrum, it is argued that the law, in its current formulation and interpretation, does not protect the rights of persons with non-heteronormative SOGIE. Reasons of public order or social mores, religion, culture, and an essentialist understanding of SOGIE often underscore this argument.[67] Because the law does not protect non-heteronormative SOGIE rights, that there can be no discrimination based on non-heteronormative SOGIE. Moreover, legal reform would be necessary to protect the rights of these individuals. However, as set out in the reports of the Independent Expert and argued throughout this dissertation, the law in its current formulation and interpretation does in fact protect the rights of *all persons*, including persons with non-heteronormative SOGIE.

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[62] See the text to part 3 3 2.
[63] Human Rights Council "Protection against violence and discrimination based on sexual orientation and gender identity" (15 July 2016) A/HRC/RES/32/2.
[64] Paras 3 and 4.
[65] Human Rights Council "Mandate of the Independent Expert of protection against violence and discrimination based on sexual orientation and gender identity" (10 July 2019) A/HRC/41/L.10/Rev.1 para 2.
[66] Human Rights Council (15 July 2016) A/HRC/RES/32/2 paras 3(a) and (e).
[67] UNHRC "Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity" (11 May 2018) A/HRC/38/43 paras 29, 45, and 48.

Despite all persons being entitled to equal rights and equal protection of their rights, persons with non-heteronormative SOGIE are targeted for violence and discrimination as a result of diverging from heteronormative conceptions of SOGIE. The violence and discrimination are described as a "manifestation of deeply entrenched stigma and prejudice, irrational hatred and a form of gender-based violence, driven by an intention to punish those seen as defying gender norms".[68] The Independent Expert has further recognised that discrimination based on non-heteronormative SOGIE often intersect with discrimination on the grounds of race, age, or gender, amongst others.[69] This is significant as the question of whether the ACRWC, ACHPR, and the Maputo Protocol provide children with non-heteronormative SOGIE an equal right to education as children who identify within a heteronormative framework is tied to these three intersecting forms of discrimination.

As with the OHCHR's report, the Independent Expert reiterated that the criminalisation of same-sex relations, the lack of anti-discrimination legislation and measures, the failure to recognise the self-identified gender of transgender persons, as well as a lack of education that cultivates awareness and understanding of diverse SOGIE, exacerbate non-heteronormative SOGIE-based violence and discrimination, and leads to sociocultural exclusion.[70] The Independent Expert recommended that these obstacles be removed in order to ensure that persons with non-heteronormative SOGIE are accorded equal rights as to all other persons. This recommendation is in line with the obligation on states to ensure that all persons are equal before the law and not discriminated against based on "sex" or "other status". Throughout the reports of the Independent Expert, it is repeated that the right of all persons to not be discriminated based on SOGIE applies to children as well. The comments made in relation to the impact of discrimination on education and the rights of the child give context to the discussion under 4 2 4.

The resolutions and reports discussed above demonstrate that discrimination based on non-heteronormative SOGIE is prohibited under "other status" in Article 2 of the UDHR. The OHCHR and the Human Rights Council recognise the importance of addressing violence and discrimination on these grounds through monitoring human rights violations, as well as through providing suggestions as to how states can ensure compliance with their international obligations. The Human Rights Council's opposition towards this violence, discrimination and

[68] Human Rights Council "Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity" (19 April 2017) A/HRC/35/36 paras 2-3; UNHRC (11 May 2018) A/HRC/38/43 para 51.
[69] Human Rights Council (19 April 2017) A/HRC/35/36 para 39. See also part 2 6 2.
[70] Paras 52-61. See also parts 1 1 and 1 6.

stigmatisation stems from the notion that human rights are universal, and that, as such, all persons are entitled to equal respect for and protection of their rights without distinction.

4 2 4 Education

4 2 4 1 The meaning of "everyone has the right to education"

Article 26 of the UDHR provides a comprehensive right to education. Resolutions of the Human Rights Council and reports of the Independent Expert and the Special Rapporteur on the Right to Education provide content to this provision. *Resolution 1998/33* of the Commission on Human Rights, now the Human Rights Council, created the Special Rapporteur on the Right to Education. The Special Rapporteur is mandated to report on the progressive realisation of the right to education, to recommend means through which this realisation can occur, and to "promote the elimination of all forms of discrimination in education".[71] From the outset, the Special Rapporteur differentiated between education as a means to an "efficient production of human capital" and as a human right that accrues to all people based on the "equal worth of all human beings". The latter conception of education view people as human rights subjects. This distinction fosters an understanding that realising the right to education for all requires an approach that ensures that all persons can access and benefit from it.[72]

Article 26(1) sets out those obligations that explain to what extent states should provide certain levels of education. The Special Rapporteur importantly set forth the 4-A scheme "denoting the four essential features" of the right to education. According to this scheme, education should be available, accessible, acceptable, and adaptable. The last three features are directly linked to the determination of the right to education of children with non-heteronormative SOGIE.[73] When considering the availability of education, it is enough to mention that states should provide sufficient school-infrastructure.[74]

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[71] Commission of Human Rights "Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights" (17 April 1998) E/CN.4/1998/33 para 6(a)(i)-(iii).

[72] Commission of Human Rights "Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33" (13 January 1999) E/CN.4/1999/49 para 13.

[73] Para 50.

[74] Para 52. This requires school buildings to be safe, that there are enough schools to accommodate the children of a particular area, that there are enough teachers, and that appropriate learning materials be available in the learner's home language. See the text to part 1 7.

Whereas access to education requires that states admit children to public schools without discrimination, the acceptability of education relates to its form and content.[75] An acceptable education must be child-friendly, ensure that the child is protected from humiliating or degrading treatment that could infringe on their human dignity, and should also respect the freedom of parents or guardians to decide on the moral and religious education of their child.[76] In this regard, the prior right of parents or guardians can pose challenges to ensuring that the form and content of education are acceptable for all children, including children with non-heteronormative SOGIE. This is explored in part 4 2 4 2.

Whereas the acceptability of education relates to both its form and content, the adaptability of education adds to what the content of education should be. According to the Special Rapporteur, an adaptable education is one that reviews "[w]hat children should learn at school and how the learning process should be organized" with due consideration given to the "viewpoint of the child as the future adult" and the changing global landscape.[77] This requires that the content of education be consistently reviewed to create a balance between local and global knowledge, as well as the type of skills and values taught. Importantly, human rights education should provide the overarching context.[78] Here, the Special Rapporteur also stressed the role of education in identifying and replacing "discriminatory and/or stereotyped portrayal of girls and women" in an attempt to "help the new generation avoid the stereotypes that we have all been raised with".[79] Although this statement was made with girls and women in mind, it can be equally applied to how discriminatory or stereotypical ideas surrounding persons with non-heteronormative SOGIE are included in educational material, exacerbating the discrimination and marginalisation that these persons experience.[80]

As intended, the 4-A scheme has visibly influenced the work of the UN bodies when considering this right.[81] It aims to contribute to a holistic understanding of the right to education under international law that is cognisant of the need for education to be accessible to all children, including children with non-heteronormative SOGIE, and adaptable to changing values and ideas.

[75] Paras 57 and 63.
[76] Paras 67 and 68.
[77] Para 70.
[78] Para 72.
[79] Para 73.
[80] See the text to parts 5 4 2, 5 4 3, and 5 5 3.
[81] See the text to parts 4 4 4, 4 5 4, and 4 6 5.

In its report of 17 November 2011, the OHCHR expressed concern over the impact of discrimination on the right to education.[82] The OHCHR cited discrimination based on SOGIE as sometimes resulting in learners "being refused admission [to a school] or being expelled" and further indicates that learners with non-heteronormative SOGIE are frequent targets of "violence and harassment, including bullying" at the hand of their peers and educators.[83] The report illustrates how discrimination can prevent children from accessing education. In this regard, the Special Rapporteur on the Right to Education has also drawn attention to how patriarchalism socialises children to adopt certain gender roles, which conditions them towards gendered behavioural patterns, resulting in men often becoming masculine, intolerant or violent.[84] The Independent Expert explained that a lack of awareness of diverse sexual orientations and gender identities further compounds the stigma surrounding non-heteronormative SOGIE and exacerbates violence and harassment.[85] Addressing these issues requires a two-pronged approach to education that includes confronting prejudice and stigma pertaining to sex, gender, and sexual orientation in the curriculum, as well as "comprehensive, accurate and age-appropriate" sex education.[86] The Independent Expert's statements aim to ensure that education is acceptable in not exposing children to undignified treatment. Furthermore, education should adapt to changing values, reflecting that all persons are entitled to the rights outlined in the UDHR without discrimination.

4 2 4 2 Weighing human rights education against the right of parents

Article 26(2) of the UDHR provides that:

> "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace".

[82] Human Rights Council (17 November 2011) A/HRC/19/41 paras 15-17 and 58-61.
[83] Para 58.
[84] Human Rights Council "Girls' right to education. Report submitted by the Special Rapporteur on the right to education, Mr. V. Muñoz Villalobos" (8 February 2006) E.CN.4/2006/45 para 28.
[85] Human Rights Council (19 April 2017) A/HRC/35/36 para 35.
[86] Human Rights Council (17 November 2011) A/HRC/19/41 paras 58-61. According to the Special Rapporteur on the right to education, for sexual education to be comprehensive, it has to teach children of diverse SOGIE's. The Special Rapporteur also states that diverse sexual education "is a basic tool for ending discrimination against persons of diverse sexual orientations". See, UNGA "Report of the United Nations Special Rapporteur on the right to education" (23 July 2010) A/65/162 para 23.

Arajärvi explains the minimum content of the four aspects that education shall be directed towards, as set out in Article 26(2). First, directing education "to the full development of the human personality" shows that it has a "general ethical aim" to develop the "physical, intellectual, psychological, and social" dimensions of the individual. Second, "strengthening respect for human rights" requires that, at a minimum, the content and aims of education should not be incompatible with the rights enshrined in the UDHR.[87] Thirdly, promoting "understanding, tolerance, and friendship among all nations" prohibits discrimination and promotes the co-existence of diverse views.[88] Finally, furthering UN activities of peace and cooperation refers to how the content of education should reflect the UN Charter.[89]

In essence, Article 26(2) provides for human rights education, with *Resolution 66/137* of the UNGA giving content thereto through the adoption of the United Nations Declaration on Human Rights Education and Training ("Declaration on Human Rights Education").[90] Article 2 of the Declaration on Human Rights Education explains that:

> "Human rights education and training encompasses (a) *Education about human rights*, which includes providing knowledge and understanding of human rights norms and principles, the values that underpin them and the mechanisms for their protection; (b) *Education through human rights*, which includes learning and teaching in a way that respects the rights of both educators and learners; (c) *Education for human rights*, which includes empowering persons to enjoy and exercise their rights and to respect and uphold the rights of others" [*own emphasis*].[91]

Article 4 further states that human rights education should reflect the rights contained in the UDHR because it would contribute to the "effective realization of all human rights", and promote "tolerance, non-discrimination and equality".[92] Human rights education therefore requires that learners are taught human rights principles and to respect the rights of their peers and all other persons in an environment where educators do the same. Furthermore, Articles 26(1) and (2) read together mean that learners should be taught awareness of the stigma and prejudice against persons for not conforming to sex, gender, and sexual orientation norms.

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[87] P Arajärvi "Article 26" in A Eide, G Alfredsson, G Melander, L A Rehof & A Rosas (eds) *The Universal Declaration of Human Rights: A Commentary* (1992) 405 409.
[88] 555.
[89] Arajärvi "Article 26" in *UDHR* 555.
[90] UNGA "United Nations Declaration on Human Rights Education and Training" (19 December 2011) A/RES/66/137.
[91] Article 2.
[92] Article 4.

Through this, children can be empowered to exercise their own rights, while upholding the equal rights of others.

Apart from what education should seek to achieve, Article 26(3) also grant parents or guardians a "prior right to choose the kind of education that shall be given to their children".[93] Thus, parents or guardians have the right to choose an education for their children that conforms to their religious or moral convictions.[94] However, considering Article 26(3) in light of Article 26(2), the prior right of parents or guardians cannot conflict with what education should be directed towards. Although parents or guardians are granted a prior right, Arajärvi explains that they cannot choose for their children to receive an education that is inimical to human rights education or the aims it sets forth to achieve.[95] Moreover, it does not mean that children are "objects of agreements between their parents and their school".[96] Rather, children should be recognised as the subject of the right to education and should be consulted in this regard.[97]

Ultimately, Articles 26(2) and (3) require that a balance be struck between the religious, cultural, and moral convictions of parents or guardians and education about, through and for human rights. However, Article 26(2) is clear that education should be directed towards the full development of the human personality and fostering respect for the human rights and fundamental freedoms of all persons without distinction.

The argument presented is that the religious, cultural, and moral convictions of parents will be outweighed when confronted with the right of all persons to an equal education. This is supported by the 4A-scheme, requiring that the right to education be available, acceptable, and accessible to all persons. In this regard, accessibility specifically refers to addressing discrimination to ensure that it does not hinder learners from benefitting from education. Education having to be adaptable will further outweigh the prior right of parents or guardians where their convictions contradict international human rights norms. Ultimately, the right to education is framed by the right to human dignity, granting each child the right to dignified treatment in schools.[98] Considering the elements of the right to education discussed here, respecting the human dignity of learners requires that all learners should be afforded an equal opportunity to enjoy and benefit from education.

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[93] Article 26(3) of the UDHR.
[94] Arajärvi "Article 26" in *UDHR: A Common Standard of Achievement* 567.
[95] 555.
[96] Commission of Human Rights "Annual report of the Special Rapporteur on the right to education, Katarina Tomaševski, submitted in accordance with Commission on Human Rights resolution 2000/9" (11 January 2001) E/CN.4/21/52 para 77.
[97] Para 77.
[98] See 4 2 4.

4 3 ICCPR

4 3 1 Human dignity as an underlying value

The Preamble of the ICCPR provides that the "equal and inalienable rights" of all persons "derive from [their] inherent dignity". Although the ICCPR does not include an explicit right to human dignity as under the UDHR, the right to human dignity underscores all the rights contained in the ICCPR because these rights originate from dignity itself. Human dignity is, therefore, embedded in the language of the ICCPR.

As its title suggests, the ICCPR is concerned with civil and political rights. According to the Preamble, recognising civil and political rights depends on the existence of conditions that enable the enjoyment of civil and political rights, as well as economic, social and cultural rights. The interdependence of these two groups of rights is thus established. The Preamble to the ICCPR refers to the rights of the UDHR, affirming that the ICCPR draws from and expands on its provisions.[99] It further reiterates the obligations imposed on states under the UN Charter to "promote universal respect for, and observance of, human rights and freedoms" and indicates that individuals are also responsible for striving towards the promotion of the rights enshrined in the ICCPR.[100]

Because human dignity underlies the provisions of the ICCPR and is not included as a separate substantive provision, it is necessary to consider how the HRC has given content to human dignity through the interpretation of other rights, for example, the right to humane treatment, and the right to life. In discussing the right to humane treatment enshrined under Article 10 in *General Comment 21*, the HRC explained that:

> "Treating all persons deprived of their liberty with humanity and with respect for their dignity is a *fundamental and universally applicable rule*. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as … sex … or other status" [*own emphasis*].[101]

Although this comment was made in the context of persons deprived of their liberty, confirming that human dignity accrues to all persons without distinction in this context established the relationship between human dignity and non-discrimination in the broader framework of the ICCPR.

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[99] See 4 3 1.
[100] Preamble to the ICCPR.
[101] HRC "General Comment 21: Article 10 (Humane treatment of persons deprived of their liberty)" (10 March 1992) A/44/40 para 4.

Human dignity has also been connected to the right to life under Article 6. In *General Comment 36*, the HRC explained that the right to life should not be given a narrow interpretation and that it includes the right to a dignified life.[102] According to Joseph, a dignified life refers to being "[free] from threats to life that arise from general societal conditions".[103] Furthermore, the right to life aims to "[address] those circumstances that plausibly threatens one's life and simultaneously undermine dignity".[104] *General Comment 36* is significant for calling on states to develop comprehensive strategies to promote non-violence in education, as well as establishing awareness-raising campaigns regarding "gender-based violence and harmful practices" as part of promoting the dignified life of all persons. Here, non-violence includes preventing and addressing the exclusion and bullying children based on their non-heteronormative SOGIE.

In *General Comment 26*, the HRC further explained that human dignity has both a survival and developmental aspect. Whereas the survival aspect requires that persons have the needs necessary for their survival met, the developmental aspect entails that persons be treated with concern for their emotional and mental well-being in order to secure equal access to and enjoyment of their fundamental rights.[105] This can also be applied in the context of education to ensure that children with non-heteronormative SOGIE are not discriminated against in schools and that the curriculum is inclusive of them.

4 3 2 Non-discrimination

4 3 2 1 Defining discrimination under Article 26

Article 2(1) provides that all State Parties to the ICCPR must undertake to respect and ensure the rights of all persons contained therein "without distinction of any kind". Whereas Article 2(1) requires State Parties to respect and ensure the rights of all persons, Article 26 goes further. It establishes that:

> "All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons

[102] HRC "General Comment 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life" (30 October 2018) CCPR/C/GC/36 para 3.
[103] S Joseph "Extending the right to life under the International Covenant on Civil and Political Rights: General Comment 36" (2019) 19 *Hum Rights Law Rev* 1 10.
[104] 10.
[105] HRC "General Comment 36" para 26.

equal and effective protection against discrimination on any ground such as … sex … *or other status*" [*own emphasis*].

In *Broeks v Netherlands*,[106] the HRC explained that Article 26 "derives from the principle of equal protection of the law without discrimination" under the UDHR and imposes obligations on states in respect of "their legislation and the application thereof".[107] States should, therefore, ensure that the content of legislation prohibits discrimination and that it applies to all persons on equal terms.[108] Despite the inclusion of a comprehensive right to non-discrimination, the ICCPR does not define discrimination. However, in *General Comment* 18, the HRC provided guidance on what constitutes discrimination.[109] This definition contains four elements: there has to exist (i) difference in treatment that is; (ii) based on a person's belonging to a particular group; (iii) with the intended or unintended consequence of; (iv) infringing on a right under the ICCPR that persons are entitled to on equal terms. A claim of discrimination must satisfy these requirements to be successful.

With regard to the first element, the HRC in *General Comment 18* stated that not all instances of differentiation will constitute discrimination. Where differentiation is reasonable, objective, and has a legitimate aim, it is permissible.[110] Concerning the second element, the complainant will have to show that the difference in treatment is based on one of the prohibited grounds contained in Article 26 and that it affects the group as a whole and not just the complainant as an individual.[111] The third element refers to direct and indirect discrimination. Whereas direct discrimination "involves less favourable treatment of the complainant than that of someone else on prohibited grounds in comparable circumstances", indirect discrimination refers to where the law looks neutral on face value but has a disproportionate effect on a particular group.[112] With regard to the fourth element, it is logical that a matter brought to the HRC will require the complainant to allege an infringement of a right under the ICCPR.

The second element is of particular importance to the primary research question as it pertains to what constitutes prohibited grounds of discrimination. As with the UDHR and the other treaties under discussion in the remainder of this chapter, the ICCPR does not explicitly

[106] Communication 172/1984 (9 April 1987) CCPR/C/29/D/172/1984.
[107] Para 12.3.
[108] Para 12.4.
[109] HRC "General Comment 18: Non-discrimination" (10 November 1989) CCPR/C/37 para 7.
[110] Para 13.
[111] *Vos v Netherlands* Communication 218/1986 (29 March 1989) CCPR/C/35/D/218/1986 para 1 of the Separate Opinion of Aguilar Urbina & Wennergren.
[112] S Joseph, J Schultz & M Castan *The International Covenant on Civil and Political Rights: Cases, materials, and commentary* (2004) 693-694.

prohibit discrimination based on sexual orientation, gender identity or gender expression. However, as is illustrated below, discrimination based on these grounds has been included under discrimination based on 'other status' in Article 26 in the findings of the HRC related to submitted communications.[113]

4 3 2 2 Communications that shaped the development of the prohibition of discrimination of non-heteronormative

Toonen v Australia[114] was the first case in which the HRC found a violation of a right under the ICCPR as a result of discrimination based on sexual orientation. *Toonen* concerned sections 122 and 123 of the Tasmanian Criminal Code's alleged violation of the rights to privacy and non-discrimination under the ICCPR. The impugned provisions allowed prosecution for "unnatural sexual intercourse", "intercourse against nature", and "indecent practices between male persons".[115] Two of the three arguments set forth by the Tasmanian authorities are discussed here.[116] First, it was argued that the provisions of the Tasmanian Criminal Code were last invoked in 1984 and that there were no policies in place to enforce it.[117] Second, it was argued that "moral considerations must be taken into account when dealing with the right to privacy".[118]

With regard to the first argument, the HRC held that the "continued existence of the challenged provisions" infringed on Toonen's privacy.[119] In respect of the second argument, the HRC held that moral issues are not "exclusively a matter of domestic concern" and that adopting such an approach would prevent the HRC from scrutinising other statutes that infringe on the right to privacy.[120] Furthermore, because the provisions of the Tasmanian Criminal Code had not been enforced since 1984, it cannot be viewed as essential to protecting and preserving Tasmanian morals.[121] As a result, the HRC found that the infringement on Toonen's right to

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[113] See the text to part 4 3 3 1.
[114] Communication 488/1992 (31 March 1994) CCPR/C/50/D/488/1992 ("*Toonen*").
[115] Para 2.3.
[116] Paras 6.2 and 8.3. See also, HRC "General Comment 16: Privacy" (19 May 1989) CCPR/C/21/Rev.1 para 4 The third argument concerned Article 17 of the ICCPR, which enshrines the right to privacy. According to the Tasmanian government, Article 17 only creates "a right to freedom from arbitrary or unlawful interference with privacy, and that as the challenged laws were enacted by democratic process, they cannot be an unlawful interference with privacy". The HRC rejected this argument, referring to *General Comment 16* in which it was explained that "even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances".
[117] Para 6.3.
[118] Para 7.2.
[119] Para 8.2.
[120] Para 8.5.
[121] Para 8.6.

privacy was arbitrary because the interference was not proportional to the aim sought to be achieved and cannot be necessary in any circumstances.[122] Through this approach, the HRC importantly dismissed the idea that cultural relativism can outweigh universal rights.[123]

The judgment in *Toonen* is of particular significance as a result of the HRC's claim that "sex" in Articles 2 and 26 includes sexual orientation.[124] Despite being asked for guidance as to whether "other status" in Article 26 includes sexual orientation, the HRC refrained from commenting.[125] According to Lau, the HRC's interpretation in *Toonen* establishes that states have obligations in respect of protecting persons with non-heteronormative sexual orientations. Although there is no explicit reference to sexual orientation in the ICCPR, *Toonen* illustrates that "sexual orientation rights are embedded" in the language of the ICCPR.[126] Furthermore, Mittelstaedt's assertion that *Toonen* established the foundation for the protection of non-heteronormative SOGIE rights under international law is valid considering the subsequent developments in international law.[127]

Following *Toonen*, in *Young v Australia*,[128] the complainant was denied a pension under the Veteran's Entitlement Act because he did not fall within the definition of dependant.[129] It was argued that Australia's refusal to recognise the complainant as a dependant of his deceased partner was based on his sexual orientation and was, therefore, a violation of his right to equal treatment and non-discrimination.[130] The HRC confirmed its decision in *Toonen*, stating that Article 26 prohibits discrimination based on sexual orientation.[131] The HRC explained that where a distinction is "based on reasonable and objective criteria", it will not amount to unfair discrimination.[132] Because the state failed to prove how excluding same-sex partners from receiving pension benefits, but granting these benefits to unmarried heterosexual partners, was reasonable and objective, the HRC found that it had discriminated against Young based on his

[122] Para 8.3.
[123] See 3 4 1.
[124] Para 8.7.
[125] Para 8.7.
[126] H Lau "Sexual orientation: testing the universality of international human rights law" (2004) 71 *U Chi L Rev* 1689 1700.
[127] E Mittelstaedt "Safeguarding the rights of sexual minorities: the incremental and legal approaches to enforcing international human rights obligations" (2008) 9 *Chi J Int'l L* 353 361.
[128] Communication 941/2000 (18 September 2003) CCPR/C/78/D/941/2000 ("*Young*").
[129] Para 2.1.
[130] Para 3.1.
[131] Para 10.4.
[132] Para 10.4.

"sex or sexual orientation".[133] Lau points out that the decision in *Young* is significant for "elevat[ing] sexual orientation from an issue of criminality to an issue of equal opportunity".[134]

Moving further towards equal rights for homosexual persons, the HRC in *Fedotova v Russia*[135] had to consider an allegation that the complainant's right to freedom of expression, guaranteed under Article 19 of the ICCPR, was violated. The complainant was prosecuted under the Ryazan Region Law for putting up posters near a secondary school stating that homosexuality is normal and that she is proud of her homosexuality.[136] It was argued that, because there was no objective justification for the prohibition of information being disseminated amongst children regarding homosexuality under Ryazan Region Law, the state violated Article 26.[137] According to the HRC, any limitation of a right "must conform to the strict tests of necessity and proportionality".[138] With reference to *General Comment 34*, the HRC explained that

> "limitations … for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition … [but] must be understood in the light of universality of human rights and the principle of non-discrimination".[139]

The HRC found that restricting the complainant's freedom of expression was not reasonable and objective. Furthermore, the state failed to show a legitimate purpose for prohibiting the complainant from "expressing her sexual identity and seeking understanding for it".[140] It was further held that convicting the complainant for spreading information about homosexuality amongst minors discriminated against her based on her sexual orientation.[141]

Toonen was a landmark decision for including sexual orientation under "sex" as a prohibited ground of discrimination which catalysed the development of the increasing recognition and protection of the rights of homosexual persons under international human rights law. Similarly, the HRC's decision in *G v Australia* is another landmark decision in relation to the protection of the rights of persons with non-heteronormative gender identities and expression under

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[133] Para 10.4. See also *X v Colombia* Communication 1361/2005 (30 March 2007) CCPR/C/89/D/1361/2005 paras 2.1-2.2, 3.1 and 7.2. The facts and decision in *X v Colombia* are similar to *Young*.
[134] Lau (2004) *U Chi L Rev* 1701.
[135] Communication 1932/2010 (30 November 2012) CCPR/C/106/D/1932/2010.
[136] Paras 2.1-2.2. and 3.4.
[137] Para 3.6.
[138] Para 10.4.
[139] Communication 1932/2010 para 10.5. See also, HRC "General Comment 34: Article 19 (Freedoms of opinion and expression)" (12 September 2011) CCPR/C/GC/34 para 32.
[140] Communication 1932/2010 para 10.7.
[141] Para 10.8

international human rights law.[142] G is a transgender woman whose sex was registered as male at birth. G underwent hormone treatment and sex affirmation surgery, had her name changed on her driver's license, bank and credit cards and had her name and gender changed on her passport.[143] The matter came before the HRC as a result of the state's refusal to allow G to change the sex on her birth certificate based on the Births, Deaths and Marriages Registration Act of 1995 requiring a person to be "unmarried at the time of their application to register a change of sex".[144] G argued that this refusal infringed on her rights to privacy and non-discrimination.[145]

The following facts are of particular relevance for understanding the decision of the HRC. G was married under the Marriage Act of 1961 and did not intend to get divorced. However, the Marriage Act did not allow same-sex marriages, which the marriage would become if the state allowed G to change the sex on her birth certificate.[146] The state argued that the interference with G's privacy was not disproportionate because it was reasonable and proportionate to the purpose of guaranteeing that the Births, Deaths and Marriages Registration Act remained consistent with the definition of marriage in the Marriage Act.[147] According to the HRC, the state's argument did not amount to a legitimate reason for refusing to change G's sex on her birth certificate to match her current sex and gender.[148] In this regard, attention was drawn to the state's failure to explain how changing "sex on a birth certificate would result in irreconcilable and unacceptable conflict with the Marriage Act".[149] G had been issued with a passport which reflected her identified sex and gender. Moreover, she was validly married in terms of the Marriage Act. Her birth certificate should, therefore, be amended to reflect this lawful reality.[150]

The HRC further found that the state's conduct discriminated against G based on her marital status and gender identity. Thus, the state was found to have violated Article 26 of the ICCPR for failing to provide G and persons in a similar situation "equal protection of the law as a married transgender person".[151] The HRC's decision is significant because it held, for the first

[142] Communication 2172/2012 (28 June 2017) CCPR/C/119/D/2172/2012.
[143] Para 2.1.
[144] Para 2.6.
[145] Paras 3.1 and 3.4.
[146] Paras 2.6 and 4.7.
[147] Para 4.8.
[148] Para 7.6.
[149] Para 7.7.
[150] Para 7.9.
[151] Para 7.14.

time, that Article 26 prohibits "discrimination on the basis of … gender identity, including transgender status".[152]

The HRC's interpretation of prohibited grounds of discrimination preceded that of the other human rights bodies in establishing the prohibition of discrimination based on sexual orientation and gender identity. The communications discussed here illustrate the development of the understanding of what constitutes prohibited grounds of discrimination under the ICCPR and indicate that the HRC has established sexual orientation and gender identity as prohibited grounds of discrimination. It also shows that the rights and freedoms enshrined under the ICCPR are interpreted broadly and restrictions narrowly. The HRC further illustrated that arguments of public morality cannot be invoked to prevent persons with non-heteronormative SOGIE from enjoying the fundamental rights and freedoms that accrue to all persons equally. In this respect, states are obligated to take steps to ensure that persons with non-heteronormative SOGIE have equal rights and equal enjoyment of rights and freedoms in law and in fact.

4 3 3 Balancing children's right to special protection and parents' rights in respect of the religious and moral education of their children

Article 24(1) provides that "[e]very child shall have, without any discrimination … the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State". In this regard, states have to take into consideration the "vulnerability and immaturity of children, as well as their capacity for development".[153] From the jurisprudence related to Article 24(1), two trends can be deduced. First, that it includes the principle of the best interests of the child.[154] Second, that where a violation of a different provision of the ICCPR is found, the HRC tends to not consider the claim under Article 24(1).[155]

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[152] Para 7.12.

[153] *Blessington and Elliot v Australia* Communication 1968/2010 (17 November 2014) CCPR/C/112/D/1968/2010 para 7.11. See also, *Huamán v Peru* Communication 1153/2003 (22 November 2005) CCPR/C/85/D/1153/2003 para 6.5.

[154] See, *Maalem v Uzbekistan* Communication 2371/2014 (4 September 2018) CCPR/C/123/D/2371/2014 paras 11.8-11.9; *Z v Australia* Communication 2279/2013 (7 December 2015) CCPR/C/115/D/2279/2013 para 7.5; *Bakhtiyari v Australia* Communication 1069/2002 (6 November 2003) CCPR/C/79/D/1069/2002 para 9.7; *D and E v Australia* Communication 1050/2002 (9 August 2006) CCPR/C/87/D/1050/2002 para 6.4.

[155] See, *Nakarmi v Nepal* Communication 2184/2012 (8 May 2017) CCPR/C/119/D/2184/2012 paras 11.7-11.8; *Tharu v Nepal* Communication 2038/2011 (21 October 2015) CCPR/C/114/D/2038/2011 para 10.11; *Dovadzija v Bosnia and Herzegovina* Communication 2143/2012 (10 November 2015) CCPR/C/114/D/2143/2012 para 11.9.

Article 24(1) is ancillary to Articles 2 and 26, focusing specifically on the additional special measures that must be adopted to protect children's rights.[156] All the rights enshrined therein apply equally to children. Article 24(1) is, therefore, not the only provision that protects the rights of the child under the ICCPR. It simply adds to existing state obligations.[157] However, states will have to determine how to give effect to the rights contained in the ICCPR in a manner that is specifically geared towards children.[158] In *General Comment 17*, the HRC explained that the measures taken to fulfil the rights under the ICCPR can also include those of an economic, social, and cultural nature. For example:

> "[E]very possible measure should be taken to foster the development of their personality and to provide them with a level of education that will enable them to enjoy the rights recognized in the Covenant, particularly the right to freedom of opinion and expression".[159]

In light thereof, it is clear that although the ICCPR does not guarantee the right to education, the rights enshrined therein nonetheless implicate and influence it. Here, it is important to consider how to balance the right to education and children's right to special protection against the right to freedom of thought, conscience, and religion and the related right(s) of parents in respect of the religious and moral education of their child. This is of particular importance considering that Article 5(1) of the ICCPR prohibits an interpretation of the rights enshrined therein in a manner that allows its "limitation to a greater extent than is provided for". Article 18(1) of the ICCPR provides all persons with the "right to freedom of thought, conscience and religion" and includes the freedom to manifest "religion or belief in worship, observance, practice and teaching". Article 18(4) is related hereto, providing that states should:

> "[H]ave respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions".[160]

In *General Comment 22*, the HRC explained that "teaching" under Article 18(1) includes the "freedom to choose … religious leaders, priests and teachers, [and] the freedom to establish seminaries or religious schools".[161] The argument set forth here is that although Article 18(1)

[156] HRC "General Comment 17: Article 24 (Rights of the Child)" (7 April 1989) paras 1 and 5.
[157] Para 2.
[158] Para 3.
[159] Para 3.
[160] Article 18(4).
[161] HRC "General Comment 22: Article 18 (Freedom of thought, conscience or religion)" (30 July 1993) CCPR/C/21/Rev.1/Add.4 para 4.

provides persons with the "freedom to choose", this cannot be construed as meaning that parents have the freedom to demand that all public-school teachers are of the same religion or beliefs as them. Similarly, where it would be in the child's best interests, either the child or the state, on behalf of the child, can choose an education that rejects the "freedom to choose" of their parents or guardian.

Related hereto is the HRC's indication that Article 18(4) allows public schools to teach the "general history of religions and ethics if it is given in a neutral and objective way".[162] Moreover, public schools are prohibited from teaching a particular religion or belief "unless provision is made for non-discriminatory exemptions or alternatives".[163] This is in line with *General Comment 34*, in which the HRC explains that laws are not allowed to discriminate against non-religious persons in favour of religious persons, and vice versa.[164]

In *Ross v Canada*,[165] the HRC drew attention to the right to be free from "religious hatred". In this matter, the complainant, a teacher, made anti-Semitic statements in public. As a result, he was demoted to a non-teaching position.[166] According to the HRC, his statements could not be construed as a valid expression of his religious opinions because it degraded the Jewish faith and their beliefs through encouraging Christians to express contempt with Jews and their ancestry, as well as questioning the validity of the Jewish faith.[167] The HRC explained that restricting the complainant's right in terms of Article 18 was justified in the circumstances because there was a clear link between his conduct and the "poisoned school environment" that Jewish children experience as a result.[168]

The HRC's decision in *Ross* can be applied to address discrimination against children with non-heteronormative SOGIE in schools. The religious and moral convictions of parents, society, and the state have been shown to create an intolerant and often violent atmosphere that encourages the marginalisation of children with non-heteronormative SOGIE, preventing them from being able to benefit equally from education. Ultimately, as in *Ross*, this creates a "poisoned school environment" that does not respect the inherent dignity of the child.

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[162] HRC "General Comment 22" para 6. See also, *Hartikainen v Finland* Communication 40/1978 (9 April 1981) CCPR/C/OP/1 paras 10.4-10.5.
[163] HRC "General Comment 22" para 6. See also, Leirvåg, Orning and Galåen v *Norway* Communication 1155/2003 (23 November 2004) CCPR/C/82/D/1155/2003 paras 14.2-14.7.
[164] HRC "General Comment 34: Article 19 (Freedoms of opinion and expression)" (12 September 2011) CCPR/C/GC/3 para 48.
[165] (26 October 2000) CCPR/C/70/D/736/1997 ("*Ross*"). See also, D Carpenter "So made that I cannot believe: the ICCPR and the protection of non-religious expression in predominantly religious countries" (2017) 18 *Chic. J. Int. L.* 218 2229.
[166] Paras 2.1-2.3.
[167] Para 11.5.
[168] Para 11.6.

Considering Article 18(4) in light of Article 26 and the vast jurisprudence of the HRC discussed above, states are not obligated to respect the freedom of parents to ensure the religious and moral education of their children should it constitute discrimination against children based on their non-heteronormative SOGIE. Rather, the freedom provided to parents in terms of Article 18(4) should be viewed in the broader context of the rights provided under the ICCPR.

4 4 ICESCR

4 4 1 Human dignity as an underlying value

The wording of the Preambles to the ICCPR and the ICESCR are almost identical. Thus, the discussion under 4 3 2 can be applied almost verbatim. As under the ICCPR, the Preamble to the ICESCR provides that the "equal and inalienable rights" of all persons "derive from the inherent dignity of the human person". The only difference between the Preamble to the ICCPR and the ICESCR is that, whereas the purpose of the ICCPR is to create conditions that ensure the enjoyment of civil and political rights, the focus of the ICESCR is to do so in respect of economic, social, and cultural rights. Like the ICCPR, the ICESCR confirms that the rights contained under each are intertwined: creating the necessary conditions to fulfil the rights under the ICESCR inevitably requires the same for the rights under the ICCPR, and vice versa.[169]

The CESCR's references to human dignity in the context of the right to adequate housing and the rights of persons with disabilities are valuable for establishing the role of human dignity as an underlying value of the ICESCR. In *General Comment 4*, which deals with the right to adequate housing under Article 11(1), the CESCR confirmed that the rights in the ICESCR derive from the "inherent dignity of the human person" and that, as a result, all rights should be interpreted through the lens of human dignity.[170] Furthermore, in *General Comment 5*, the CESCR explained that, although there is no explicit reference to persons with disabilities in the ICESCR, the provisions contained therein nonetheless apply to them by virtue of the fact that its "provisions apply fully to all members of society".[171] It was also confirmed that states are obligated to take appropriate measures to ensure that disabled persons can fully and equally enjoy the rights set forth in the ICESCR.[172]

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[169] Preamble to the ICESCR.
[170] CESCR "General Comment 4: The Right to Adequate Housing (Article. 11(1) of the Covenant) (13 December 1991) E/1992/23 para 7.
[171] CESCR "General Comment 5: Persons with Disabilities" (9 December 1994) E/1995/22 para 5.
[172] Para 5.

Through these two general comments, the CESCR confirms that human dignity lies at the core of the human rights regime because all rights derive therefrom, that all persons should be ensured all rights without distinction, and that State Parties must take appropriate measures to enable persons who are prevented from accessing their rights due to disadvantage to access it.

4 4 2 Non-discrimination

Article 2(2) of the ICESCR requires states to undertake to guarantee the rights contained therein "without discrimination of any kind as to race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth *or other status*" [own emphasis].[173] Related hereto, Article 10(3) provides that children are entitled to "[s]pecial measures of protection and assistance … without any discrimination for reasons of parentage *or other conditions*" [*own emphasis*]. Various authors have described non-discrimination as being the dominant theme of the ICESCR.[174] Similarly to the ICCPR, "discrimination" is not defined in the ICESCR. However, the CESCR has defined discrimination.[175] The definition provided in *General Comment 20* is identical to the one provided in *General Comment 18* of the HRC, but adds that discrimination "includes incitement to discriminate and harassment".[176]

As a point of departure, and in order for differential treatment to constitute discrimination under the ICESCR, it has to infringe on a right enshrined in the ICESCR. Furthermore, like under the ICCPR, treatment with a differential effect on a person based on belonging to a particular group is sufficient for the treatment to constitute discrimination. Thus, the treatment does not have to have discriminatory intent.[177] This element prohibits both direct and indirect discrimination.[178]

The CESCR in *General Comment 20* explains that differentiation will not constitute discrimination if the "justification for differentiation is reasonable and objective".[179] A reasonable and objective differentiation requires that the "aim and effect of the measures or

[173] Article 2(2) of the ICESCR.
[174] B Saul, D Kinley & J Mowbray *The International Covenant on Economic, Social and Cultural Rights: Commentary, cases, and materials* (2014) 174. See also M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1998) 153-154; B G Ramcharan "Equality and non-discrimination" in L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 246 246.
[175] See discussion under 4 3 3 1 of this Chapter. See also, CESCR "General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)" (2 July 2009) E/C.12/GC/20 para 7.
[176] Para 7.
[177] Saul, Kinley & Mowbray *ICESCR: Commentary, cases, and materials* 181.
[178] CESCR "General Comment 20" para 10. See also text to part 4 3 3 1.
[179] CESCR "General Comment 20" para 13.

omissions [be] legitimate" and that there exist a relationship between the differentiation and the aim sought to be achieved.[180] However, where differentiation is based on a prohibited ground listed under Article 2(2), discrimination is presumed. Although Article 2(2) sets out numerous prohibited grounds, the reference to "other status" in Article 2(2) "indicates that this list is not exhaustive and other grounds may be incorporated".[181]

Sexual orientation was first referred to as a prohibited ground of discrimination in *General Comment 14* of 2000 in relation to the right to the highest attainable standard of health, enshrined in Article 12 of the ICESCR.[182] However, it was only in *General Comment 20* that the CESCR listed sexual orientation and gender identity as general prohibited grounds of discrimination under the reference to "other status".[183] Significantly, the CESCR also included discrimination based on age under "other status" and explained how old age or youth often impede people from equal access to their economic, social and cultural rights. In the case of children, "unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination".[184] In *General Comment 20*, the CESCR further drew attention to that individuals or groups of individuals can face discrimination on multiple intersecting grounds, for example, age, race, sex, sexual orientation, and gender identity. According to the CESCR, "[s]uch cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying".[185] The impact of discrimination based on age, sexual orientation, and gender identity as multiple and intersecting grounds on the right to education is considered in more detail under 4 4 3.

Article 2(2) also requires states to guarantee the rights set forth therein without discrimination. To this end, states should address both formal and substantive discrimination, provide remedies to those who suffer discrimination, and ensure that the institutions that or persons who discriminate are held accountable for the consequences of their conduct.[186] Whereas formal discrimination is addressed through the prohibition of discrimination in laws and policies, substantive discrimination necessitates taking measures to address the

[180] Para 13.
[181] Para 15.
[182] CESCR "General Comment 14: The Right to the Highest Attainable Standard of Health (Article. 12)" (11 August 2000) E/C.12/2000/4 para 18.
[183] CESCR "General Comment 20" para 32.
[184] Para 29.
[185] Para 17. See 2 6 2.
[186] Para 40.

disadvantages faced by "groups of individuals which suffer historical or persistent prejudice" in accessing certain fundamental rights as a result of this prejudice.[187]

4 4 3 Education

Article 13 of the ICESCR provides all persons with a comprehensive right to education. It has been described as the "most wide-ranging and comprehensive article on the right to education in international human rights law".[188] Article 13 must be considered in the historical context of the establishment of the UN and the adoption of the UDHR. As stated above, the UN was formed, and the UDHR adopted, against the backdrop of the atrocities committed during the First and Second World Wars.[189] During the Second World War, education was used to promote the normalisation of discrimination; that specific groups of individuals should not have access to what is now recognised as fundamental rights. In light hereof, the drafters of the core UN human rights treaties were cognisant of how education could be used as an instrument in favour of human rights violations, while simultaneously recognised the liberating and developmental potential of education.[190] As a result, the right to education in the ICESCR does not only recognise the right of all persons to education, but also includes the aims which education should strive towards.

Article 13(1) of the ICESCR "recognize the right of everyone to education". The use of the term "everyone" in the first sentence of Article 13(1) is important for determining to whom the right applies. The recognition that *everyone* has the right to education implies that the right to education accrues to *all persons without distinction*. In *General Comment 13*, the CESCR explains that Article 2(2) applies to Article 13(1) and that the prohibition against discrimination "applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination".[191] In this regard, Saul et al argues that discrimination on prohibited grounds infringes on children's human dignity and can undermine or destroy their ability "to benefit from educational opportunities".[192]

The CESCR has expressed concern over the discrimination that children face in schools based on their non-heteronormative SOGIE. In its concluding observations on Germany and

[187] Para 8.
[188] CESCR "General Comment 13: The Right to Education (Article. 13)" (8 December 1999) E/C.12/1999/10 para 2.
[189] See the text to part 4 2 1.
[190] KD Beiter *The Protection of the Right to Education by International Law* (2005) 463.
[191] CESCR "General Comment 13" para 31.
[192] Saul, Kinley & Mowbray *ICESCR: Commentary, cases, and materials* 1110.

Costa Rica, the CESCR indicated that discrimination based on sexual orientation and gender identity continues despite legislative and other measures having been taken to address it. In both concluding observations, the CESCR emphasised its concern with reports of this type of discrimination in schools, stating that the absence of recognising non-heteronormative gender identities presents a barrier to fulfilling the right to education.[193] In its concluding observation on Kazakhstan, the CESCR again reiterated that discrimination based on non-heteronormative SOGIE inhibits access to and enjoyment of the right to education. Importantly, it drew attention to the persistent "[b]ullying, violence and discrimination" against these learners in schools.[194]

The first sentence of Article 13(1) further states that "State Parties to the present Covenant *recognize* the right of everyone to education" [*own emphasis*]. The use of the word "recognise" implies that states are obligated to take steps towards achieving the progressive realisation of the right to education.[195] This requires that states take all the necessary and possible measures towards achieving clearly specified aims to, ultimately, fulfil the obligations imposed by the right to education.[196] In light hereof, states have to take measures to ensure that children are not discriminated against based on their non-heteronormative SOGIE as it prevents them from enjoying their right to education in its entirety.[197]

Besides the obligation on states to recognise the right of all persons to education, Article 13(1) also sets forth three aims that education should be directed towards and seek to achieve. Education should, First, "be directed to the full development of the human personality and the sense of its dignity". Because the first aim is concerned with the individual's development, it is individual-focused.[198] In both the *travaux préparatoires* of the ICESCR and *General Comment 13*, this has been confirmed as the most important aim of education.[199] Mehedi explains that the reason for focusing on the individual's development ensures that education is not "directed exclusively at serving a social body or in extreme cases an ideology" as was done

[193] CESCR "Concluding Observations: Germany" (27 November 2018) E/C.12/DEU/CO/6 para 22; CESCR "Concluding observations: Costa Rica" (21 October 2016) E/C.12/CRI/CO/5 para 20.
[194] CESCR "Concluding Observations: Kazakhstan" (29 March 2019) E/C.12/KAZ/CO/2 para 10. See also, CESCR "Concluding Observations: Cameroon" (25 March 2019) E/C.12/CMR/CO/4 para 23; CESCR "Concluding Observations: Chile" (7 July 2015) E/C.12/CHL/CO/4 para 12; CESCR "Concluding Observations: Guatemala" (9 December 2014) E/C.12/GTM/CO/3 para 9; CESCR "Concluding Observations: Peru" (30 May 2012) E/C.12/PER/CO/2-4 para 5.
[195] UNGA "Draft International Covenants on Human Rights" (1 July 1955) A/2929 322-323. See also, M Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2 ed) (2016) 570.
[196] Ssenyonjo *ESCR in International Law* 571.
[197] This is discussed in more detail when considering the aims of education, state obligations at the different levels of education, as well as parents or guardians right in terms of their child's religious and moral education.
[198] Beiter *Right to Education* 468.
[199] UNGA "Official records of the twelfth session" (16 October 1957) A/C.3/SR.782 para 38; UNGA "Official records of the twelfth session" (16 October 1957) A/C.3/SR.783 para 66; CESCR "General Comment 13" para 5.

during the Second World War.[200] Related hereto, the CESCR in its concluding observation on Venezuela noted that school programmes that focus on the indoctrination of learners are incompatible with Article 13(1) as it does not have the individual child's development in mind.[201] In considering what an education directed at the full development of the human personality entails, Beiter refers to Arajärvi. According to them:

> "[E]ducation must provide all those educational opportunities necessary for the development of all dimensions of the human personality – physical, intellectual, spiritual, psychological and social. In other words, education must not be limited to the transmission of academic knowledge. The goal is rather that every person should be able to develop *all* aspects of his personality to the best of his abilities and talents, to become a harmonious person" [*emphasis in original text*].[202]

The first aim further requires that education be directed towards developing a sense of human dignity. Significantly, Article 13(1) is the only education provision under international human rights law to do so. According to Beiter, this requires that learners develop a sense of their own dignity, as well as the dignity of others.[203] In this sense, the first aim is tied to the second aim, being to strengthen the respect for human rights and fundamental freedoms. Whereas the first aim of education is focused on the individual, the second concerns the individual's role in society at large.[204] Respect for the dignity of others is the foundation of respecting the human rights and fundamental freedoms of all. The first and second aims are also tied to the third, which requires education to "promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups".[205]

In *General Comment 13*, the CESCR notes that the aims of education mirror the purpose of the UN. As a result, states should ensure that the content of education, at all levels, are directed at achieving the objectives set out under Article 13(1).[206] The aims expressed, therefore, requires that human rights education be presented "at all levels of education both as a subject and as a methodology of instruction, reflecting values of participation and social inclusion".[207] In promoting understanding, tolerance and friendship for all, education has the potential to

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[200] M Mehedi "The Content of the Right to Education" (8 July 1999) E/CN.4/Sub.2/1999/10 para 23; Beiter *Right to Education* 470.
[201] CESCR "Concluding observations: Venezuela" (7 July 2015) E/C.12/VEN/CO/3 para 30.
[202] Beiter *Right to Education* 470-471; Arajärvi "Article 26" in *UDHR: A commentary* 409.
[203] Beiter *Right to Education* 471.
[204] 468.
[205] Article. 13(1).
[206] CESCR "General Comment 13" paras 4 and 49.
[207] CESCR "Concluding observations: Nepal" (16 January 2008) E/C.12NPL/CO/2 para 47. See the text to part 4 2 4.

address stigma and prejudice towards certain individuals based on their belonging to a particular group.[208] This includes children with non-heteronormative SOGIE.

Article 13(2) of the ICESCR indicates to what extent states are obligated to provide specific levels of education to all persons. Because this dissertation is concerned with the right to education of children, defined as individuals under the age of 18, the focus here is on primary and secondary education. Whereas primary education should be compulsory and free to all children, secondary education should "be made generally available and accessible to all by every appropriate means".[209]

In establishing the meaning of primary education, the CESCR incorporated the approach of the World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs ("World Declaration on Education for All")[210] in Article 13(2)(a) of the ICESCR.[211] The World Declaration on Education for All states that primary education should be universal and satisfy the basic learning needs of all children.[212] Basic learning needs refer to the knowledge and skills that people require to "survive, to develop their full capacities, to live and work in dignity, [and] to participate fully in development", amongst others.[213] Secondary education follows on primary education and is largely concerned with completing basic education and ensuring that children are enabled to embark on a project of life-long learning, contributing to the development of their communities.[214] Because states have to make secondary education generally accessible and available, secondary education should be made available to all learners on the same basis.[215]

In *General Comment 13*, the CESCR indicated that all levels of education must comply with the 4-A scheme of being available, accessible, acceptable, and adaptable. The CESCR confirmed the approach of the Special Rapporteur on the Right to Education and made two additional comments in relation to education being adaptable and accessible.[216] With regard to education having to be adaptable, the CESR noted that education should be "flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings".[217] As to the accessibility of education,

[208] CESCR "Concluding observations: Estonia" (16 December 2011) E/C.12/EST/CO/2 para 29.
[209] Article 13(2)(a)-(b) of the ICESCR.
[210] (adopted 9 March 1990).
[211] CESCR "General Comment 13" para 9.
[212] Article 5 of the World Declaration on Education for All.
[213] Arts 1(1).
[214] CESCR "General Comment 13" para 12.
[215] Para 13.
[216] See the text to part 4 2 4 1.
[217] Para 6.

the CESCR explained that it has three dimensions. First, education should be physically accessible in terms of geographical location. Second, education should be economically accessible in that it should be affordable. Finally, the CESCR also referred to accessibility in terms of non-discrimination. In this regard, the CESCR stated that:

> "[E]ducation must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds".[218]

When implementing measures to comply with their obligations under Article 13(2), states should ensure that all aspects of the 4-A scheme are reflected in its approach due to the interrelatedness of these elements. Significantly, despite the lack of an explicit reference to the best interests of the child principle under the ICESCR, the CESCR nonetheless indicated that the "best interests of the student shall be a primary consideration" when determining the application of the scheme.[219] Here, the reference to "students" can also be read as "children" because children are the primary recipients of compulsory education. As such, in these circumstances, states must consider the best interests of the child.[220]

Considering the aims set forth under Article 13(1) in light of the obligations imposed under Article 13(2), it is clear that the right to education requires more than just providing all children with access to schools as the place where learning occurs. Rather, Article 13 should be understood as presenting a holistic vision for education whereby each learner is offered the equal opportunity to benefit from an education that is aimed at their individual development, considering their human dignity, the right to not be discriminated against, as well as their ultimate role in their communities as respecting and enabling the right of others through promoting "understanding, tolerance and friendship among all".

Similar to Article 26(3) of the UDHR, Article 13(3) of the ICESCR places an obligation on states to respect the freedom of parents or guardians to "ensure the religious and moral education of their children in conformity with their own convictions".[221] However, this freedom should still be balanced against the child's right to receive information that will contribute to their full development and ensure that the aims of education are achieved.[222]

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[218] Para 6.
[219] Para 7.
[220] See the text to part 4 2 4.
[221] See the text to part 4 2 4 2.
[222] See the text to part 4 4 3.

Beiter, explains that the child's right to receive information includes diverse sexual and reproductive health education, as well as human rights education.[223] The child's right to receive information ties in with the notion that education should contribute to the full development of all children, enabling them to become active members of their communities and developing a sense of their own dignity, as well as the dignity of others. Furthermore, the CESCR has indicated that Article 13(3) allows learners to be taught "subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression".[224]

Comparably to Article 26(3) of the UDHR, the freedom of parents or guardians cannot be respected where their religion or beliefs are "racist, hostile to human rights or anti-democratic" and is inimical to the aims of education under Article 13.[225] Thus, considering that the child is the subject of the right to education, entitled to the full range of benefits offered with due consideration of that the same right accrues to all other children, the freedom of parents and guardians under Article 13(3) is not unlimited.

4 5 CEDAW

4 5 1 Human dignity as an underlying value

At the outset, it should be noted that CEDAW applies in respect of women and girls.[226] Comparable to the ICCPR and the ICESCR, the Preamble to CEDAW reiterates the affirmation in the UN Charter and the UDHR that all persons are equal and have inherent human dignity.[227] Reference is also made to the obligations imposed under the ICCPR and the ICESCR to "ensure the equal rights of men and women" in respect of the rights contained therein. Despite the existence of various instruments that require equal rights for all, the Preamble to CEDAW draws attention to continuing discrimination against women. The Preamble does not explicitly state that the rights set forth in CEDAW derive from the inherent dignity of all persons.

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[223] Beiter *Right to Education* 503.
[224] CESCR "General Comment 13" para 28; CESCR "Concluding observations: Poland" (19 December 2002) E/C.12/1/Add.82 para 56.
[225] Beiter *Right to Education* 557.
[226] See, in general: CEDAW Committee "General Recommendation 31 of the Committee on the Elimination of Discrimination against Women on harmful practices (14 November 2014) CEDAW/C/GC/31; CEDAW Committee "General recommendation 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women" (16 December 2010) CEDAW/C/GC/28; CEDAW Committee "General recommendation 24: Article 12 of the Convention (women and health)" (1999) A/54/38/Rev.1, chap; CEDAW Committee "General recommendation 21: Equality in marriage and family relations" (1994) A/49/38.
[227] See the text to parts 4 3 1 and 4 4 1.

However, it nonetheless states that discrimination against women violates their human dignity, is an obstacle to equality, and ultimately prevents the "prosperity of society". As a result, traditional roles ascribed to men and women should be reconsidered and changed. To this end, the Preamble stipulates that it is also necessary to establish a "new international economic order" that allows "women [to participate] on equal terms with men in all fields".[228]

Human dignity is not included in a separate substantive provision of CEDAW. Nevertheless, it has been referred to in several of the CEDAW Committee's concluding observations and general recommendations, informing the right to education and assisting in framing the impact of gender-based violence and other harmful practices. In *General Recommendation 36*, the CEDAW Committee commented on the need for education to be acceptable in terms of form and substance. This is necessary to ensure that girls have equal access to education as boys, including access to the same quality of education.[229] In this regard, the CEDAW Committee also explained that the failure to respect the human dignity of girls in school "depends on the gender regime of schools which reflects the wider social order". For example, where the school environment is "marked by entrenched patriarchal ideologies", it is far more likely that the rights of girls will be denied or not fully recognised and protected.[230]

In *General Recommendation 31*, the CEDAW Committee considered the impact of harmful practices on women and girls. Harmful practices refer to "persistent practices and forms of behaviour" based on the sex or gender of the victim, amongst others. Because these practices are detrimental to women's "dignity, physical, psychosocial and moral integrity and development", it can prevent access to and enjoyment of other rights.[231] In its concluding observations on Argentina, the CEDAW Committee also reiterated the harmful impact of gender-based violence on the human dignity of women, specifically referring to lesbian, bisexual, transgender, and intersex persons.[232]

According to Holtmaat, human dignity and equality as the underlying values of CEDAW are integral to ensuring that the circumstances are created for women to participate as autonomous and free individuals in society and that they are also seen this way.[233] The work

[228] Preamble to CEDAW.
[229] CEDAW Committee "General Recommendation 36 (2017) on the right of girls and women to education" (16 November 2017) CEDAW/C/GC/36 para 57.
[230] Para 57.
[231] CEDAW Committee "General Recommendation 31 para 15.
[232] CEDAW Committee "Concluding observations on the seventh periodic report of Argentina" (25 November 2016) CEDAW/C/ARG/CO/7 para 21(f)
[233] HMT Holtmaat "The CEDAW: a holistic approach to women's equality and freedom" in A Hellum & H Sinding-Assen (eds) *Women's Human Rights: CEDAW in International, Regional and National Law* (2013) 95 98.

of the CEDAW Committee supports this, illustrating that the meaning of human dignity is integral to its objects of achieving equality for women and eliminating discrimination against women.

4 5 2 Non-discrimination

Because CEDAW is concerned with the elimination of discrimination against women Articles 1 and 2 lie at the heart of CEDAW and is vital to its implementation.[234] Article 1 defines discrimination against women[235] as a "distinction, exclusion or restriction" based on sex.[236] At first glance, discrimination based on sex seems to require discrimination to be based on the biological attributes of women. However, it must be considered that the difference between sex and gender was not considered at the level of international law at the time of CEDAW's drafting.

Toonen was the first matter where differential treatment based on sexual orientation was deemed a violation of international law.[237] Although *Toonen* was decided in 1994, the first resolution concerning discrimination based on non-heteronormative SOGIE was only adopted by the Human Rights Council in 2011.[238] Nonetheless, it should be borne in mind that the CEDAW Committee has explained that CEDAW is aimed at addressing discrimination against women, whether based on sex or gender. For example, in *General Recommendation 28*, it indicated that, whereas sex is concerned with the different biological attributes of men and women, gender refers to the social and cultural roles attached to the two sexes that favours men and disadvantages women.[239] The CEDAW Committee further recognised that women are often subject to multiple intersecting forms of discrimination, such as race, age, sexual orientation and gender identity.[240] The CEDAW Committee has also expressed concern over

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[234] CEDAW Committee "General recommendation 28" para 6.
[235] According to Article 1, "discrimination against women" refers to "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women … on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".
[236] A Byrne "Article 1" in M A Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A commentary* (2012) 51 59. See also, RJ Cook & S Cusack *Gender Stereotyping: Transnational Legal Perspectives* (2009) 107-111. Byrnes, with reference to Cook and Cusack, set out the meaning of these three terms. Whereas 'distinction' refers to the "sex-based differential treatment of women and men", 'exclusion' concerns the "patterns of belief and social practices (including gender stereotypes) which deny women the opportunities and rights that are available to men". In comparison, 'restriction' means that there are limitations on women's rights which prevents them from enjoying their rights to the same extent as men.
[237] See the text to part 4 3 3 2.
[238] See the text to part 4 2 3.
[239] CEDAW Committee "General recommendation 28" para 21.
[240] Para 18. See the text to part 2 6 2.

discrimination against women based on their sexual orientation and gender identity in numerous concluding observations.[241]

Based on the above, there is room for an argument that discrimination based on SOGIE is prohibited under CEDAW. However, Otto highlights the unwillingness of the CEDAW Committee to engage further with discrimination based on gender identity in their concluding observations and general recommendations. She suggests that some members view gender identity as "watering down" the obligations of CEDAW towards women.[242] In contrast, Holtmaat and Post draw attention to Article 5(a) which requires states to:

> "[M]odify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".[243]

In light hereof, Holtmaat and Post discuss the direct impact that "[g]ender stereotypes and fixed parental gender roles" have on persons who "renounce traditional heterosexual and patriarchal feminine and masculine gender identities and gender roles".[244] Considering that discrimination based on non-heteronormative gender identities are based on prejudice for rejecting traditional gender identities and gender roles, it is possible to conceive that under Article 5(a), CEDAW's application can extend beyond a sex-based approach and include all persons who identify as a woman.[245]

Article 1 further states that discrimination must have the "effect or purpose" of preventing women from enjoying or exercising their rights, or having their rights recognised. This means that discrimination can be direct or indirect.[246] Furthermore, for the "distinction, exclusion or restriction" to constitute discrimination under CEDAW, it has to be based on sex or gender and negatively affect women's rights.[247] Here, Article 1 sets out that women's rights are not limited

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[241] CEDAW Committee "Concluding observations on the ninth periodic report of Mexico" (25 July 2018) CEDAW/C/MEX/CO/9; CEDAW Committee "Concluding observations on the sixth periodic report of the Netherlands" (18 November 2016) CEDAW/C/NLD/CO/6; CEDAW Committee "Concluding observations of the Committee on the Elimination of Discrimination against Women: Albania" (16 September 2010) CEDAW/C/ALB/CO/3.
[242] D Otto "Queering gender [identity] in international law" (2015) 33 *NJIL* 299 307-308.
[243] Article 5(a) of CEDAW.
[244] R Holtmaat & P Post "Enhancing LGBTI rights by changing the interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women? (2015) 33 *NJIL* 319 325.
[245] 325.
[246] CEDAW Committee "General recommendation 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures" (2004) para 7.
[247] Byrne "Article 1" in *CEDAW: A Commentary* 60.

to CEDAW, but include those in the "political, economic, social, cultural, civil or any other field".[248]

Whereas Article 1 defines discrimination against women, Article 2 sets out obligations in relation to eliminating discrimination against them. In this regard, states have to proclaim their condemnation of all forms of discrimination against women.[249] States are further required to "pursue by all appropriate means and without delay a policy of eliminating discrimination against women".[250] Thus, states not only have to adopt policies identifying all forms of discrimination against women but should also ensure the implementation and ultimate success thereof.[251] Subsections (a) to (f) lists specific obligations, of which the obligation to enshrine equality as an underlying principle in national constitutions and legislation, as well as to refrain from or abolish practices that discriminate against women are the most significant. These are explored in more detail below in the context of eliminating discrimination against women in education.

4 5 3 Eliminating discrimination against women in education

The right to education under CEDAW is different to the UDHR and the ICESCR. Whereas the UDHR and the ICESCR are similar in providing that all persons have the right to education, setting out similar aims and state obligations, CEDAW discusses the steps to be taken to eliminate discrimination against women in education. According to Article 10 of CEDAW, states "shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education". To this end, men and women should have equal access to education,[252] as well as have education of the same form and content.[253] States are further obligated to eliminate gender stereotypes in education through revising and adapting the curriculum, teaching materials, and teaching methods.[254]

In *General Recommendation 36*, the CEDAW Committee explained that despite the right of all persons to education under international law and the recognised potential of education – for promoting human rights, contributing towards individual development and empowerment, and "as the pathway to gender equality" – discrimination continues to inhibit women and girls from

[248] 62.
[249] CEDAW Committee "General Recommendation 28" para 15.
[250] Article 2 of CEDAW.
[251] CEDAW Committee "General Recommendation 28" para 23.
[252] Article 10(a) of CEDAW.
[253] Article 10(b).
[254] Article 10(c).

the full range of benefits that the right offers.[255] However, the challenges that women and girls face in the realisation of their right to education can be addressed by drawing from the 4-A scheme.[256] By grounding the right to education in the 4-A scheme, the CEDAW Committee arguably placed it within the broader context of the right to education under international law.[257]

In discussing the acceptability of education, the CEDAW Committee explained that the form and substance of education must be of the same quality for boys and girls.[258] The challenge here is that the school environment and materials are often embedded with patriarchal values that reflect the wider social order, contributing to various forms of violence being tolerated in schools.[259] Attention was further drawn to the increased risk of violence that disadvantaged groups of girls, such as girls with non-heteronormative SOGIE, face at school. In this regard, the CEDAW Committee referred to the sexism and homophobia experienced by girls with non-heteronormative SOGIE.[260]

In discussing access to education, the CEDAW Committee considered how the harassment of girls with non-heteronormative SOGIE at the hand of their educators and peers presents a barrier to the right to education. This issue is exacerbated where schools either do not have policies in place to address harassment of this kind or where these policies are not implemented. Because stigma often drives violence, the CEDAW Committee recommended that prejudice be addressed in the curriculum and the larger schooling environment. Furthermore, specific reference was made to "ensuring [that] policies are in place to address the obstacles that impede [learners with non-heteronormative SOGIE from] access to education".[261]

The CEDAW Committee's approach to the right to education illustrates that the right goes beyond mere access to the school environment. For education to eliminate discrimination against women and girls and perform according to its envisaged potential, it "should be gender sensitive, responsive to the needs of girls and women and transformative for both females and males".[262] This requires addressing the patriarchal values and stigma towards learners that do not conform to heteronormative sex and gender roles that often underpin the school environment and policies, curriculum, and teaching methods.

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[255] CEDAW Committee "General Recommendation 36" paras 1 & 4.
[256] See 4 2 4.
[257] Paras 13-19.
[258] Para 56.
[259] Para 57.
[260] Para 66.
[261] Para 45.
[262] Para 13.

4 6 CRC

4 6 1 Human dignity as an underlying value

The Preamble of the CRC opens with a reference to the UN Charter's proclamation of the inherent dignity and equal and inalienable rights of all persons without distinction and reiterates that UN member states reaffirmed these principles in the UDHR. The purpose of the CRC is to provide a framework for the protection of the rights of children. Children, because of their physical and mental immaturity, require special care and attention to ensure the "full and harmonious development of his or her personality".[263] To this end, the Preamble requires that children:

> "[S]hould grow up in a family environment, in an atmosphere of happiness, love and understanding … [and be] brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity".[264]

Unlike the Preambles of the ICCPR and the ICESCR, the Preamble of the CRC does not state that the rights of the child derive from their inherent dignity. However, despite this, it is clear that recognising and respecting children's dignity and teaching them respect for other's dignity is imperative to their full and harmonious development.

In referring to the UN Charter, UDHR, ICCPR, and ICESCR, the Preamble of the CRC locates the rights of the child within the broader context of international human rights law. These instruments form the extensive framework in terms of which the provisions contained in the CRC should be interpreted. In this context, it is also significant that the Preamble draws attention to the "importance of the traditions and cultural values of each people for the protection and harmonious development of the child". This reference opens up for arguments based on cultural relativism over universal human rights. However, it should be viewed against the overarching purpose of the CRC to respect, protect, and promote the rights of the child for their full development. Thus, although the CRC recognises that traditions and cultural values contribute to development, it cannot be to the detriment of universal human rights and the underlying values of equality and dignity.

The CRC Committee has considered human dignity in relation to various rights. The statements made about the right to education and the right of the child to be free from all forms

[263] Preamble to the CRC.
[264] Preamble.

of violence are most relevant to this discussion.[265] In *General Comment 1*, the CRC Committee indicated that the aims of education set out under Article 29 promote, support and protect the inherent human dignity of children and their equal rights as core values of the CRC.[266] Similarly, the CRC Committee has urged the Kuwait state to:

> "[E]stablish an inclusive education system for all children … in order to build a society that is genuinely inclusive, that values difference and that respects the dignity and equality of all human beings regardless of differences".[267]

With regard to the right of children to be free from all forms of violence, the CRC Committee in its concluding observations on Bulgaria explained that degrading treatment in schools, whether by educators or peers, violates children's dignity.[268] The CRC Committee has also stated that corporal punishment infringes on the human dignity of the child and that non-violent methods of discipline should, therefore, be adopted at schools and at home.[269] Ultimately, any form of violence against children, whether physical or psychological erodes their inherent and absolute human dignity.[270]

As an underlying value, human dignity provides a framework in terms of which the rights contained in the CRC should be interpreted. In ensuring the rights of the child, the dignity of the child should be taken into consideration. The dignity of the child is also closely related to the best interests of the child. This is because the best interests of the child, as a primary consideration in all matters concerning them, has the potential for contributing to respecting and promoting their inherent dignity.

4 6 2 The best interests of the child

Article 3(1) of the CRC guarantees the right of the child to have their best interests be a primary consideration in all matters concerning them. In its *General Guidelines for Periodic Reports*,

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[265] Arts 19 and 29.
[266] CRC Committee "General Comment 1 (2001) Article 29(1): the aims of education" (17 April 2001) CRC/GC/2001/1 para 1.
[267] CRC Committee "Concluding observations: Kuwait" (29 October 2013) CRC/C/KWT/CO/2 para 64.
[268] CRC Committee "Concluding observations: Bulgaria" (23 June 2008) CRC/C/BGR/CO/2 para 29(b).
[269] CRC Committee "Concluding observations: Slovenia" (26 February 2004) CRC/C/15/Add.230 para 39. See also, CRC Committee "General Comment 8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para 2; and 37, inter alia) (2 March 2007) CRC/C/GC/8 para 16; CRC Committee "Concluding Observations: New Zealand" (27 October 2003) CRC/C/15/Add.216 para 30(b).
[270] CRC Committee "General Comment 13 (2011) The right of the child to freedom from all forms of violence" (18 April 2011) CRC/C/GC/13 para 17.

the CRC Committee lists the best interests of the child as one of the general principles that must be addressed in the periodic reports of states, thereby confirming its fundamental importance.[271] Article 3(1) contains six elements, providing that:

> "[i] In all actions [ii] concerning children, [iii] whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, [iv] the best interests of the child [v] shall be [vi] a primary consideration".

According to Alston and Gilmour-Walsh, the phrase "in all actions concerning children" means that the best interests of the child principle has a wide application.[272] Detrick agrees with this interpretation and argues that because no reference is made to particular rights contained in the CRC, the assumption is that the best interests principle informs the interpretation of each substantive provision.[273] In *General Comment 14*, the CRC confirmed this, stating that the principle "seeks to ensure that the right is guaranteed in all decisions and actions concerning children".[274] Alston and Gilmour-Walsh have further stated that the phrase warrants a broad interpretation as reference is made to children as a group.[275]

The best interests of the child principle must be considered wherever the work of an institution or its decisions affect the individual child or children as a group.[276] This obligation applies in respect of both public and private bodies.[277] Despite the inclusion of the best interests principle as a right under the CRC, it does not contain an explicit definition thereof. In *General Comment 14*, the CRC Committee explained that the principle is flexible, adaptable, and responsive, and should be determined in light of the circumstances of the individual child or group of children concerned.[278] In this regard, the CRC Committee provided what Eekelaar and Tobin describe as a "non-exhaustive and non-hierarchical list" of elements that help determining the best interests of the child in a particular situation.[279] These are:

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[271] CRC Committee "General guidelines for periodic reports" (20 November 1996) CRC/C/58 paras 33-39.
[272] P Alston & G Gilmour-Walsh *The best interests of the child: towards a synthesis of children's rights and cultural values* (1996) 9.
[273] S Detrick *A commentary on the United Nations Convention on the Rights of the Child* (1999) 90.
[274] CRC Committee "General comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)" (29 May 2013) CRC/C/GC/14 para 17.
[275] Alston & Gilmour-Walsh *The best interests of the child* 9-10.
[276] CRC Committee "General Comment 14" para 18-19 and 23. See also, CRC Committee "Concluding observations: Benin" (12 August 1999) CRC/C/15/Add.106 para 14; J Eekelaar & J Tobin "Article 3. The Best Interests of the Child" in J Tobin *The UN Convention on the Rights of the Child: A Commentary* (2019) 74 78.
[277] CRC Committee "General Comment 14" para 25. See also, Eekelaar & Tobin "Article 3. The Best Interests of the Child" in *UNCRC: A Commentary* 80.
[278] CRC Committee "General Comment 14" para 32.
[279] Eekelaar & Tobin "Article 3. The Best Interests of the Child" in *UNCRC: A Commentary* 84.

> "The child's views; the child's identity; preservation of the family environment and maintaining relations; care, protection and safety of the child; situation of vulnerability; the child's right to health and the child's right to education".[280]

Significantly, in *General Comment 14*, the CRC Committee indicated that children must be allowed to express their views on what would be in their best interest. However, the age and development of the child should be considered to establish how much influence a child's views should have on what would be in their best interest.[281] The CRC Committee further stated that children's right to preserve their identity must be borne in mind when determining their best interest, with identity including characteristics such as sex and sexual orientation.[282]

Article 3(1) further states that the best interests of the child "shall be a primary consideration".[283] The use of the phrase "shall be" does not afford states the discretion to decide whether or not to consider the child's best interests – states are obligated to. Moreover, because the CRC provides that the best interests of the child shall be a primary consideration, "a larger weight must be attached to what serves the child best" where there is a conflict between the rights of the child and the rights of other persons.[284] Significantly, the best interest of the child shall be *a* primary consideration, as opposed to it being *the* primary consideration. According to Vollmer, this means that there may be other factors that can overrule the best interests principle. The risk is that, in certain circumstances, this may lead to discrimination against children based on their non-heteronormative SOGIE.[285]

In light of the above, it is relevant to note that the best interests principle has been criticised for allowing states to incorporate "cultural considerations … into their implementation of the rights recognized in the CRC, which could undermine the basic consensus reflecting those rights".[286] Although states are allowed to incorporate cultural considerations, it cannot overrule the rights guaranteed under the CRC and the norms established thereby.[287] According to Alston

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[280] CRC Committee "General Comment 14" paras 52-79. See also, Detrick *A commentary on the UNCRC* 88; Alston & Gilmour-Walsh *The best interests of the child* 2; J Eekelaar "The interests of the child and the child's wishes: the role of dynamic self-determinism" in P Alston (ed) *The best interests of the child: reconciling culture and human rights* (1994) 42-61; R Mnookin *In the interest of children: advocacy, law reform and public policy* (1985) 17-18.
[281] CRC Committee "General Comment 14" para 54.
[282] Para 55.
[283] Article 3(1) of the CRC.
[284] CRC Committee "General Comment 14" para 39.
[285] Vollmer *Queer families* 90.
[286] Detrick *A commentary on the UNCRC* 89; Alston & Gilmour-Walsh *The best interests of the child* 2.
[287] 2.

and Gilmour-Walsh, where cultural considerations conflict with human rights norms, human rights norms must prevail.[288] Significantly, in *General Comment 14*, the CRC Committee stated that "the best interests of the child are to be the determining factor when taking a decision on adoption, but also on other issues".[289] In light hereof, there seems to be a move from the best interests of the child being *a* primary consideration, to it being *the* primary consideration.

The CRC Committee has described the best interests principle as a threefold concept. It is (i) a substantive right; (ii) a fundamental, interpretative legal principle; and (iii) a rule of procedure.[290] It is a substantive right in the sense that it imposes an intrinsic obligation on states to guarantee the best interests of the child in all matters concerning the child. Where there are conflicting interpretations of a legal provision, the interpretation that favours the best interests of the child must be followed. In this regard, the best interests principle is, therefore, a fundamental interpretative legal principle. The best interests principle is also a rule of procedure as it requires states to show "what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations".[291]

Related to the best interests principle is the obligation imposed on states under Article 3(2) to "ensure the child such protection and care as is necessary for his or her well-being". To this end, states have to take legislative, administrative and other measures. Although measures are subject to the state's available resources, it still has to be effective and promote the purpose of the CRC.[292] Unlike the best interests principle, "well-being" has not been defined and has also not featured much in academic writing. Ekelaar and Tobin argue that, at a minimum, "an outcome which is inconsistent with one of the rights under the Convention would be inconsistent with a child's well-being".[293]

Article 3(2) also requires that states take into consideration the rights and duties of parents or legal guardians in ensuring children's well-being. The aim here is to balance the responsibilities of the state towards children and the role of parents and guardians to care for their children.[294] In certain instances, the view of the state and parents or guardians will conflict regarding what would be most favourable for the child's well-being. Where a state's views

[288] P Alston & G Gilmour-Walsh *The best interests of the child* 39.
[289] CRC Committee "General Comment 14" para 38.
[290] Para 6.
[291] Para 6.
[292] Eekelaar & Tobin "Article 3. The Best Interests of the Child" in *UNCRC: A Commentary* 103.
[293] 102.
[294] 102.

conflict with those of parents or guardians, it should be determined whether it would be reasonable to infringe on the right of parents or guardians in the specific circumstances. In this regard, it must first be ascertained whether the views of the parents or guardians fall within the scope of their rights and duties in respect of their child. If it does, the state has to show that the "measure taken to secure child's care and well-being was reasonable" [emphasis removed].[295] Reasonableness, in turn, requires that there exists a rational link between the measure adopted and the child's well-being. Furthermore, there should not be a less restrictive means available.[296]

Despite the importance of the best interests principle and the underlying obligation to ensure the well-being of the child, the CRC Committee has not referred to non-heteronormative SOGIE in this context. However, the CRC Committee has reiterated that the right of the child to have their best interests taken into consideration must be "interpreted and applied in all proceedings related to children".[297] As a result, the principle is arguably applicable to the right of the child to education, including not to be discriminated against based on their non-heteronormative SOGIE is the context of education.

4 6 3 Non-discrimination

Article 2(1) of the CRC provides that:

> "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's … sex … or other status".

Article 2(1) is similar in wording to the ICCPR and the ICESCR.[298] As such, it suffices to state that the CRC Committee has referred to discrimination as prohibiting unjustifiable differential treatment that restricts a child or group of children from enjoying rights guaranteed under the CRC.[299]

As a point of departure, states must respect and ensure the rights of the child under the CRC without discrimination. According to the CRC Committee in *General Comment 5*, this requires

[295] 103.
[296] 103.
[297] CRC Committee "Concluding observations: El Salvador" (29 November 2018) CRC/C/SLV/CO/5-6 para 14.
[298] See the text to parts 4 3 3 and 4 4 3.
[299] CRC Committee "Concluding observation: Belgium" (23 May 2002) CRC/C/15/Add.178 para 6.

states to review existing policies and legislation to ensure compliance with the CRC.[300] In this regard, the following principles should be taken into consideration: (i) non-discrimination; (ii) the best interests of the child; (iii) respect for the child's right to life, survival, and development; and (iv) respect for the child's views in all matters concerning them.[301]

Article 2(1) also places an obligation on states to adopt special measures to realise the rights of vulnerable groups of children and to, ultimately, "diminish or eliminate conditions that cause discrimination".[302] In light hereof, it is clear that Article 2(1) not only requires states to simply prohibit discrimination in respect of the rights enshrined under the CRC, but also places an obligation on states to take "appropriate proactive measures … to ensure equal opportunities for all children".[303] Appropriate proactive measures include, but are not limited to, legislative changes, ensuring sufficient financial and administrative resources, as well as reviewing and adapting the school curriculum and environment to change discriminatory attitudes.[304]

Like the UDHR, ICCPR, and the ICESCR, the CRC also prohibits discrimination based on various listed grounds including "other status". As a result, the prohibited grounds of discrimination present an open list. In *General Comment* 4, the CRC Committee stated that discrimination based on sexual orientation is prohibited under the CRC.[305] In *General Comment 15*, the CRC Committee added that discrimination based on gender identity is also prohibited.[306] It has further reiterated the prohibition of discrimination on these grounds under the CRC in numerous concluding observations, indicating that states have to address stigmatisation, violence, and discrimination against children based on their non-heteronormative SOGIE in all contexts.[307]

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[300] CRC Committee "General Comment 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)" (27 November 2003) CRC/GC/2003/5 para 18.
[301] Para 12.
[302] Para 12.
[303] CRC Committee "General Comment 14" para 41.
[304] CRC Committee "General Comment 5" para 12.
[305] CRC Committee "General Comment 4: Adolescent health and development in the context of the Convention on the Rights of the Child" (21 July 2003) CRC/GC/2003/4 para 2.
[306] CRC Committee "General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)" (17 April 2013) CRC/C/GC/15 para 8.
[307] CRC Committee "Concluding observations on: Argentina" (1 October 2018) CRC/C/ARG/CO/5-6 para 14(a); CRC Committee "Concluding observations: New Zealand" (21 October 2016) CRC/C/NZL/CO/5 para 15(b); CRC Committee "Concluding observations: Pakistan" (11 July 2016) CRC/C/PAK/CO/5 para 19; CRC Committee "Concluding observations: Russian Federation" (25 February 2014) CRC/C/RUS/CO/4-5 para 24.

4 6 4 Education

4 6 4 1 Right to education

Articles 28 and 29 of the CRC both concern the right to education. Whereas the former deals with the right to education, the latter deals with the aims thereof. Article 28(1) requires states to "recognize the right of the child to education" and that this be achieved "progressively and on the basis of equal opportunity". To this end, Article 28(1) refers to obligations in respect of the different levels of education, mirroring those under the UDHR and the ICESCR.[308] Relying on the discussion under 4 2 4 1 and 4 4 3 the analysis in this subsection does not consider each obligation, but rather considers the meaning of Article 28(1) and how it applies to children with non-heteronormative SOGIE.

According to Beiter, the formulation of Article 28(1) "entails instructions to the state rather than [an] actionable entitlement of the individual".[309] The progressive achievement of the right to education imposes positive and negative obligations on states. In this regard, states should ensure that nothing interferes with children's right to education through repealing legislation and addressing administrative practices that allow or promote discrimination in education.[310] Furthermore, states have to draw from the 4-A scheme set forth by the UN Special Rapporteur on the Right to Education.[311]

The obligation to make education available based on equal opportunities requires that obstacles that inhibit access to education be removed.[312] In light hereof, education must be adaptable to groups that are vulnerable to discrimination and that special policies are adopted to accommodate these groups.[313] The CRC Committee has expressed concern over discrimination against vulnerable groups of children, such as children with non-heteronormative SOGIE, explaining how it infringes on their right to an equal education. For example, in its concluding observation on Iran, the CRC Committee drew attention to children with non-heteronormative SOGIE being harassed, bullied, or expelled "for failing to observe social expectations of femininity or masculinity" and recommended that such conduct be

[308] See the text to parts 4 2 4 and 4 4 4.
[309] Beiter *Right to Education* 118.
[310] Verheyde "Article 28" in *A Commentary on the UNCRC* 51.
[311] See the text to part 4 2 4 1.
[312] A Bucataru "Using the Convention on the Rights of the Child to Project the Rights of Transgender Children and Adolescents: The Context of Education and Transition" (2016) 3 *QMHRRR* 59 64.
[313] M Verheyde "Article 28: The Right to Education" in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans & M Verheyde (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2006) 40.

prohibited, prevented and punished.[314] Furthermore, in its concluding observation on Japan, the CRC Committee urged the state to strengthen human rights education to reduce and prevent discrimination against persons with non-heteronormative SOGIE in schools, as well as in the larger society.[315]

General Comment 20 considered the implementation of the rights of the child during adolescence. The CRC Committee explained that, as part of their rapid development, adolescents must negotiate dependence on their parents or guardians while also establishing an autonomous self.[316] As a result, adolescents are particularly vulnerable to various societal pressures. Attention was further drawn to adolescence as a "source of discrimination" because adolescents are often "treated as incompetent and incapable of making decisions about their lives".[317] However, with reference to *General Comment 12*, the CRC Committee stressed that children's evolving capacities must be taken into consideration when determining their best interests.[318] In *General Comment 20*, the CRC Committee pointed to the importance of ending discrimination against adolescents in general but also indicated that states should focus on eliminating discrimination against groups that are vulnerable to discrimination based on their age, as well as their non-heteronormative SOGIE.[319] In this regard, Article 28(1)(e) of the CRC is significant for requiring that states "[t]ake measures to encourage regular attendance at schools and the reduction of drop-out rates" because discrimination against children based on their non-heteronormative SOGIE has been connected to learners not completing their basic education. Considering this, the CRC Committee illustrates an understanding of multiple and intersecting grounds of discrimination and how it can exacerbate vulnerability.

Moreover, Article 28 goes beyond providing the right to education. Article 28(2) refers to the use of school discipline and requires that states ensure that it is "administered in a manner consistent with the child's human dignity". This provision is unique to the right to education under the CRC; it places strict limits on the types of discipline that can be used in schools and aims to promote non-violence.[320] Article 28(2) is based on the understanding that corporal punishment and bullying in schools can constitute inhumane and degrading treatment and

[314] CRC Committee "Concluding observations: Islamic Republic of Iran" (14 March 2016) CRC/C/IRN/CO/3-4 para 77(e) and 78(d).
[315] CRC Committee "Concluding observations: Japan" (5 March 2019) CRC/C/JPN/CO/4-5 para 18(c).
[316] CRC Committee "General Comment 20 (2016) on the implementation of the rights of the child during adolescence" (6 December 2016) CRC/C/GC/20 para 9.
[317] Para 21.
[318] Committee "General Comment 12 (2009) The right of the child to be heard" (20 July 2009) CRC/C/GC/12 paras 70-74.
[319] Paras 33 and 70.
[320] CRC Committee "General Comment 1" para 8.

infringes on the child's right to human dignity.[321] In this regard, *General Comment 4* of the CRC Committee is of particular importance, urging states to:

> "[P]revent and prohibit all forms of violence and abuse, including sexual abuse, corporal punishment and other inhuman, degrading or humiliating treatment or punishment in school, by school personnel as well as among students".[322]

In light hereof, corporal punishment and bullying can also be viewed as infringing on the right of the child to be protected from "all forms of physical or mental violence"[323] and to not be subjected to inhumane or degrading treatment or punishment.[324] Ultimately, the education environment should be such that all children can benefit equally from the opportunities offered by the right to education and contribute towards achieving the aims of education.

4 6 4 2 Aims of education

Closely related to Article 28 of the CRC, Article 29(1) provides the aims of education. In *General Comment 1*, the CRC Committee sets out the importance of the aims of education. These aims place an obligation on states to promote and protect the inherent dignity of the child and their equal and inalienable rights.[325] States also have to take steps to ensure that the aims of education are reflected in the curriculum, as part of teacher-training, as well as in "education policies and legislation".[326] Importantly, the obligations imposed on states by Article 29(1) aims to establish a "balanced approach to education" that respects and values difference. As such, the CRC Committee has explained that these obligations should outweigh the "boundaries of religion, nation and culture".[327]

The aims under the CRC are similar to those set out under the UDHR and the ICESCR.[328] Article 29(1)(a) requires that education be directed to the full development of children's "personality, talents and mental and physical abilities". Thus, education should go beyond merely imparting knowledge. Rather, it should be "child-centred, child-friendly and

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[321] CRC Committee "General Comment 1" para 8. See also, CRC Committee "Violence against children in the family and at school" (28 September 2001) CRC/C/111 paras 679(b); CRC Committee "Concluding observations: Zimbabwe" (7 June 1996) CRC/C/15/Add.55 para 18.
[322] CRC Committee "General Comment 4" para 13.
[323] Article 19(1) of the CRC.
[324] Article 37(a).
[325] CRC Committee "General Comment 1" para 1.
[326] Paras 17-18.
[327] Para 4.
[328] See the text to parts 4 2 4 1 and 4 4 3 2.

empowering".[329] The school environment should show and cultivate respect for the inherent dignity of children, and encourage them to express their views and participate in school life.[330] To this end, the CRC provides children with participation rights, which includes freedom of expression and association, as well as freedom of thought, conscience and religion.[331] Article 12(1) is of particular significance, providing children who are capable of forming views on matters that affect them with the right to express these views. However, the weight attached thereto will depend on the particular child's age and maturity. In light hereof, a child-friendly education should be geared towards the "development of the individual child" in a manner that takes into consideration the child's right to participate and influence their own development.[332] The CRC Committee's concluding observation on North Korea further indicates that:

> "[Child-friendly schools are] based on the principles of creating healthy and protective environments for learning, inclusiveness and gender-sensitivity and establishing partnerships between schools and the community, to empower children and allow them to develop in a holistic manner".[333]

This observation should also be considered in the context of Articles 29(1)(b) and (d). Article 29(1)(b) requires that education be directed towards developing "respect for human rights and fundamental freedoms". Article 29(1)(d) enhances this by adding that education should prepare children for a "responsible life in a free society, in the spirit of understanding, peace, tolerance … and friendship among all peoples".

According to the CRC Committee, these two subsections require that human rights education be included at all levels of education.[334] It has further explained that human rights education includes teaching children of the human rights enshrined in treaties, as well as that human rights be taught by example.[335] In light hereof, the CRC Committee has condemned the "strong focus on ideological indoctrination" in the curriculum of North Korean schools, reiterating the aim of Article 29(1)(d).[336] Ultimately, Article 29 requires that all derogatory

[329] CRC Committee "General Comment 1" para 2.
[330] Para 8.
[331] Arts 13-15 of the CRC.
[332] CRC Committee "General Comment 1" para 9.
[333] CRC Committee "Concluding observations: Democratic People's Republic of Korea" (23 October 2017) CRC/C/PRK/CO/5 para 46(h).
[334] CRC Committee "Concluding observations: Bhutan" (5 July 2017) CRC/C/BTN/CO/3-5 para 11(c); See also, CRC Committee "Concluding observations: Denmark" (26 October 2017) CRC/C/DNK/CO/5 para 37.
[335] CRC Committee "General Comment 1" para 15.
[336] CRC Committee "Concluding observations: Democratic People's Republic of Korea" para 47-48.

content be removed from the curriculum, as well as information that encourages violence or discrimination based on sex or religion.[337]

The CRC adds two aims of education that do not appear in the UDHR or the ICESCR. Article 29(1)(c) requires that education should cultivate respect for diversity. More specifically, it states that education should be directed towards:

> "The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own".

Article 29(1)(c) has a dual function in prohibiting "degrading references to other states and cultures" while simultaneously imposing a "positive obligation to ensure that children develop some respect for such states and cultures".[338] This is confirmed in various concluding observations where the CRC Committee has encouraged states to include respect for diverse cultures and religions as part of its curriculum.[339]

Significantly, Article 29 does not mention non-discrimination. However, the general prohibition of discrimination enshrined in under Article 2(1) of the CRC applies in respect of all rights contained therein, including the right to education. In *General Comment 1*, the CRC Committee explains that direct or indirect discrimination has the potential to undermine the right to education and offends the inherent dignity of the child. Furthermore, discrimination contradicts the developmental aim of education.[340] The CRC Committee has also addressed the impact of intolerance on education and vice versa: whereas ignorance and a fear of difference exacerbate intolerance, an education that reflects the aims of Article 29(1) has the potential to combat it.[341] Related hereto is the CRC Committee's reference to the damaging effects of "gender stereotypes and patriarchal values" in *General Comment 12*.[342] Although this statement was made in relation to the rights of the girl-child, Bucataru argues that the same reasoning can be applied to the rights of transgender children "because the same gender

[337] CRC Committee "Concluding observation: Maldives" (14 March 2016) CRC/C/MDV/CO/4-5 para 63.
[338] Beiter *Right to Education* 120.
[339] CRC Committee "Concluding observations: Syrian Arab Republic" (6 March 2019) CRC/C/SYR/CO/5 para 45; CRC Committee "Concluding observations: Belgium" (13 June 2002) CRC/C/15/Add.178 paras 25-26; CRC Committee "Concluding observations: Federal Republic of Yugoslavia (Serbia and Montenegro)" (13 February 1996) CRC/C/15/Add.49 para 30.
[340] CRC Committee "General Comment 1" para 10.
[341] Para 11.
[342] CRC Committee "General Comment 12" para 77.

stereotypes and heteronormative values place 'severe limitations' on their rights as well".[343] This argument can be extended to include children with non-heteronormative SOGIE in general as the same logic applies.

4 7 Yogyakarta Principles

The YP was developed by the International Commission of Jurists and the International Service for Human Rights and was adopted in March 2007. Its purpose is to indicate how existing international human rights standards, like the ones discussed throughout this chapter, should be applied to protect persons from human rights violations based on their non-heteronormative SOGIE. The content of the YP is drawn primarily from the ICCPR and the ICESCR and the principles are formulated similarly to corresponding rights under international human rights treaties.[344] Thus, it does not create new rights or new obligations, but "affirm binding international legal standards with which all States must comply".[345] Because the YP were developed with existing human rights law standards in mind, it has potential, as soft law, to shape the application of international human rights law to persons with non-heteronormative SOGIE.[346]

The YP comprises of 29 principles, with the YP+10 adding an additional ten principles.[347] The general structure consists of a statement of an existing human right, followed by specific references as to how it should be applied in a manner that ensures that persons with non-heteronormative SOGIE are not discriminated against, as well as the state obligations required for its fulfilment. The additional principles provided in the YP+ 10 comprises of a combination of civil and political rights on the one hand, and social, economic, and cultural rights on the other. According to O'Flaherty, the YP are notable for including comprehensive legal obligations in relation to each right that are based on "well-established international law and practice".[348] These obligations require that states:

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[343] Bucataru (2016) 3 *QMHRRR* 67.
[344] M O'Flaherty & J Fisher "Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta Principles" (2008) 8 *Hum Rts L Rev* 207 234.
[345] Available at <https://yogyakartaprinciples.org/principles-en/> (accessed 27-05-2019).
[346] Wallace & Martin-Ortega *International Law* 30: Soft law refers to non-binding international instruments containing "norms, principles, commitments or standards expected to be complied with by states, and increasingly non-state actors" and is "intended to mould conduct on the international scene".
[347] Available at <http://yogyakartaprinciples.org/principles-en/yp10/> (accessed 27-05-2019).
[348] O'Flaherty "The Yogyakarta Principles at ten" (2015) 33 *Nord J Int L* 280 285.

> "(1) take all necessary legislative, administrative, and other measures to eradicate impugned practices; (2) take protection measures for those at risk; (3) ensure accountability of perpetrators and redress for victims; and (4) promote a human rights culture by means of education, training, and public awareness raising".[349]

Principle 1 of the YP confirms that "[a]ll human beings are born free and equal in dignity and rights" and that "[h]uman being of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights". Here, the YP mirrors equality and dignity as the foundation of the international human rights framework. Principle 2 concerns the rights to equality and non-discrimination and provides an explicit right to all persons to not be discriminated against based on their sexual orientation or gender identity in the exercise of their fundamental rights. This Principle further refers to the multiple intersecting forms of discrimination that people experience and indicates that discrimination based on sexual orientation and gender identity are often "compounded by discrimination on other grounds, including gender, race, [and] age". Throughout this chapter, it was illustrated that the treaty bodies under discussion have increasingly started interpreting the rights to dignity, equality, and non-discrimination in this way, without necessarily referring directly to the YP.

Principle 16 importantly indicates that all persons have the "right to education, without discrimination on the basis of, and taking into account, their sexual orientation and gender identity". The recommendations refer to adopting measures to ensure the equal treatment of learners and staff, that the form and content of education "enhance understanding of and respect for, inter alia, diverse sexual orientations and gender identities", and that learners are not bullied or harassed in the school environment based on their sexual orientation and gender identity. Similar approaches have been recommended by the general comments and concluding observations discussed in this chapter.

The YP have been cited in the conclusions and recommendations of several of the Human Rights Council's Universal Periodic Reviews as a source that states must consider in policy development.[350] In *General Comment 20*, the CESCR cited the definitions of sexual orientation and gender identity provided in the YP in finding that the ICESCR's prohibition of

[349] 285.

[350] These references from the Human Rights Council confirms the role of the Yogyakarta Principles as soft law, intended to influence how states should approach the increasing recognition, protection, and promotion of the rights of persons with non-heteronormative SOGIE. See, Human Rights Council "Report of the Working Group on the Universal Periodic Review: Estonia" (28 March 2011) A/HRC/17/17 para 79; Human Rights Council "Report of the Working Group on the Universal Periodic Review: Chile" (4 June 2009) A/HRC/12/10 para 96; Human Rights Council "Universal Periodic Review: Peru" (28 May 2008) A/HRC/8/37 para 52.

discrimination based on "other status" includes discrimination based on both sexual orientation and gender identity.[351] The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health also defined sexual orientation and gender identity with reference to the YP.[352]

According to Brown, the YP constitute an accurate reflection of existing international law.[353] As a result, the YP are "becoming a standard-setting document and the inspiration for a variety of efforts to combat sexual orientation and gender identity discrimination in international law".[354] Thus, there is a clear indication that YP forms part of the international human rights discourse and influences the development and interpretation of rights by international human rights bodies.

4 8 Concluding remarks

The right to human dignity forms a framework for all international human rights norms. It communicates that all human beings are entitled to respect and concern based on being human. The international treaties discussed in this chapter are all founded on respect for human dignity. Respect for human dignity is, in turn, tied to equality. This chapter established that the right to equality demands non-discrimination. Where one person is treated as different to another, the situation warrants consideration as to the grounds behind this. The human rights treaties discussed all prohibit discrimination on listed grounds. It was shown that, although the non-discrimination provisions of the treaties under discussion do not include an explicit reference to discrimination based on sexual orientation or gender identity, discrimination on these grounds are prohibited as a result of the open-ended nature of the formulation of the non-discrimination provisions. The interpretation of the right to non-discrimination by the HRC, CESCR, the CEDAW Committee, the CRC Committee, as well as the by UN Special Rapporteurs, are explicit in their prohibition of discrimination based on non-heteronormative SOGIE.

This chapter set out the right to education under international treaty law. The essence of the right is that all persons have a right to education. The right to education places an obligation on states to take steps to realise this right. Because all persons have the right to education, this

[351] CESCR "General Comment 20" para 32.
[352] Human Rights Council "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (27 April 2010) A/HRC/14/20 para 10.
[353] D Brown "An introduction to the Yogyakarta Principles" (2010) 31 *Mich J Int L* 821 827.
[354] 827.

right accrues to all without discrimination. Discrimination includes all the grounds of discrimination prohibited under international law. As stated, discrimination based on non-heteronormative SOGIE is established as a prohibited ground of discrimination under international human rights law. Thus, all persons are entitled to the right to education without discrimination based on their non-heteronormative SOGIE. Not being discriminated against in the context of education requires education to be tolerant of and celebrate differences amongst learners. This requires human rights education, as well as comprehensive sexual education that covers a wide range of sexual orientations and gender identities. It also requires that learners not be exposed to inhumane or degrading treatment in the context of education, which includes bullying and stigmatisation based on their non-heteronormative SOGIE. Ultimately, discrimination impairs the right to education as it prevents children from benefitting from the aims of education. The aims of education are tied to the full development of the child. In this regard, education must be child-centred, child-friendly and empowering, allowing children to express their views and explore their identity.

The right of the child to have their best interests be a primary consideration in all matters concerning them is tied to the right to education as it must be interpreted and applied in all proceedings related to children. The best interests principle requires consideration of what serves the child best in a particular situation. The right to education is fundamental to the development of children who can participate in their communities and can contribute to the broader human rights project of tolerance and friendship amongst all peoples, as envisaged under the UDHR. Because children spend a substantial amount of time in educational institutions, the environment of these institutions is integral to ensuring that all children can equally benefit from the right to education. In the context of education, it is in the best interest of the child to not be discriminated against based on their non-heteronormative SOGIE, as this enables them to an equal right to education, as envisaged under international human rights law. Ultimately, "[a]ffirming the best interests of each child, and gradually equal rights of each child, has reversed the premises for decision-making – it is the school which has to adapt to the child, not the other way around".[355]

The international human rights treaties analysed in this chapter arguably contextualises the regional human rights treaties, explored under chapters 5-7. Not only did the UN treaties influence the formulation of the rights enshrined under the regional instruments, but the work

[355] K Tomaševski "Removing obstacles in the way of the right to education" (2001) 1 *Right to Education Primers* 1 47.

of the UN treaty bodies also continues to significantly affect the interpretation of regional provisions. This is particularly true when considering the right to human dignity, non-discrimination, education, and the best interests principle. Chapter 5 puts forth an analysis of the ECHR, ESC, and ESC(r). Although younger than the inter-American human rights system, the European Committee of Social Rights ("ECSR") and, particularly, the European Court of Human Rights ("ECtHR") development of the rights of persons with non-heteronormative SOGIE precedes that of the inter-American Court of Human Rights ("IACtHR"). As such, it is necessary to first consider the European human rights system.

5 The right to education of children with non-heteronormative SOGIE under European regional human rights law

5 1 Introduction

The objective of this chapter is to present the interpretation of the right to human dignity, non-discrimination and education under the ECHR, the ESC and the ESC(r), as the human rights instruments of the Council of Europe. To this end, the work of the ECtHR and the ECSR are considered.

The analysis departs from the assumption that, in its diverse formulation of these rights, the ECHR, ESC, and the ESC(r) protects the rights of persons with non-heteronormative SOGIE in general. Corresponding to the approach of chapter 4 it is similarly argued that this protection extends to children with non-heteronormative SOGIE and should therefore inform their right to education. This argument is supported by the ECtHR and ECSR's increasing implicit incorporation of tenets of queer theory and queer legal theory.[1] Despite not explicitly mentioning these theories, the argument put forward is that the ECtHR and the ECSR appreciate that an essentialist perspective of sexualities conflicts with the inherent human dignity of all persons and their right to be accepted.[2]

5 2 Overview of the European human rights system

5 2 1 Council of Europe

The Council of Europe was founded in 1949.[3] Its purpose is to unify its members in protecting and promoting its mutual ideals, as well as assisting in creating a platform for economic and social growth.[4] To date, the Council of Europe has 47 Member States.[5] The Council of Europe has three overarching aims, being the promotion of the rule of law, democracy, and human rights.[6] Its human rights mandate, which aims to promote and protect human rights and ensure

[1] See the text to part 2 4.
[2] Unlike the treaty bodies discussed under chapter 4, the ECtHR and the ECSR have made sparse reference to the Yogyakarta Principles. Therefore, these principles are only discussed in relation to the relevant case law.
[3] Council of Europe "Who we are" (2020) *Council of Europe* <https://www.coe.int/en/web/about-us/who-we-are> (accessed 09-01-2020).
[4] Article 1(a) of the Statute of the Council of Europe (adopted 5 May 1949) ETS 1.
[5] Council of Europe "Who we are" *Council of Europe*; European Union "The EU in Brief" (2020) *European Union* <https://europa.eu/european-union/about-eu/eu-in-brief_en#from-economic-to-political-union> (accessed 09-01-2020): The Council of Europe is not part of the European Union ("EU"), which is the economic and political union of 28 European states. However, all 28 EU member states are also members of the Council of Europe.
[6] Council of Europe "Home" (2020) *Council of Europe* <https://www.coe.int/en/web/portal/home> (accessed 09-01-2020).

social rights, is most relevant to the current discussion.[7] The ECHR and ESC were adopted under the auspices of the Council of Europe to give binding legal force to the rights enshrined under the UDHR.[8] As such, these treaties are central to the human rights mandate of the Council of Europe. Despite the individual importance of these treaties, the ECHR is nonetheless perceived as the "cornerstone of all Council of Europe activities" and thus overshadows the ESC.[9] This can be attributed to ratification of the ECHR as a prerequisite for Council of Europe membership.[10]

5 2 2 Human rights treaties of the Council of Europe

5 2 2 1 European Convention of Human Rights

The ECHR does not present a closed list of rights and freedoms. To date, six Protocols supplement its substantive provisions.[11] Protocol 1 is the most significant Protocol for purposes of this research, as it enshrines the right to education – a social right.[12] Despite the initial emphasis on civil and political rights, limited economic, social, and cultural rights have been incorporated over time.[13] Because Protocols add or amend rights enshrined in the ECHR or procedures of the ECtHR, separate ratification of each Protocol is required.[14]

The ECHR created with it the European Commission of Human Rights ("ECmHR") and the ECtHR.[15] The ECmHR was dissolved in 1998 with the adoption of Protocol 11, which restructured the ECtHR.[16] The restructured ECtHR has jurisdiction over "all matters concerning the interpretation and application of the Convention and the Protocols thereto" and hears inter-state cases, as well as individual petitions.[17] The ECtHR is empowered to grant

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[7] Council of Europe "Human Rights" *Council of Europe* (2020) <https://www.coe.int/en/web/portal/human-rights> (accessed 09-01-2020).
[8] See the text to part 4 2.
[9] Council of Europe "A Convention to protect your rights and liberties" (2020) *Council of Europe* <https://www.coe.int/en/web/human-rights-convention> (accessed 09-01-2020).
[10] Council of Europe "A Convention to protect your rights and liberties" *Council of Europe*.
[11] For more information on the Protocols to the ECHR, See, WA Schabas *The European Convention on Human Rights: A Commentary* (2015) 11-25.
[12] Article 2 of Protocol 1.
[13] Article 1 (protection of property); Article 2 (education).
[14] Schabas *The European Convention on Human Rights* 11.
[15] 26-28: The ECmHR was a special tribunal that started operating in 1954. The ECtHR, in comparison, was established in 1959. The ECmHR functioned as a filter to the ECtHR. Individuals had to submit applications to the ECmHR, who then decided which cases to take to the ECtHR on behalf of individuals. The decision to dissolve the ECmHR and restructure the ECtHR was a result of the increasing caseload of the bodies.
[16] For information on the restructuring of the ECtHR, See, Schabas *The European Convention on Human Rights* 26-32; Council of Europe "Reform of the Court: History of the ECHR's reforms" (2020) *European Court of Human Rights* <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=> (accessed 18-01-2020).
[17] For information on the structure, procedures, and powers of the ECtHR, See, Articles 19-51 of the ECHR.

remedies to injured parties[18] and has to give reasons for its judgments or where it renders an application admissible or inadmissible.[19]

The ECtHR emphasises a teleological approach in their interpretation of the ECHR.[20] The object and purpose of the ECHR is to protect the human rights of all persons and to maintain democratic values that promote "pluralism, tolerance and broadmindedness".[21] When interpreting the rights and freedoms enshrined in the ECHR, the ECtHR should, therefore, favour an interpretation that gives effect to its object and purpose.[22] In this regard, the ECtHR should take into account that the ECHR is a living instrument that should be read as whole and interpreted in the context of changing conditions.[23] However, the ECtHR may, importantly, depart from its previous interpretation where it "reflects societal changes and remains in line with present day conditions".[24] As such, the ECtHR emphasises a dynamic interpretation, one that effectively protects the rights and freedoms guaranteed.[25]

In deciding the merits of an application, the ECtHR must determine a fair balance between the conflicting interests of the individual or group and the general public.[26] Deciding in favour of the general public means that the individual or group's rights are limited, and vice versa. To ensure the effective protection of the rights guaranteed, the ECtHR has established that a limitation of rights will only be justified where it is prescribed by law and is reasonable and proportionate to the legitimate aim sought to be achieved. In this regard, it also considers state practice in determining the fairness of a restriction.[27] The margin of appreciation doctrine is central to this.

Harris et al explain that this doctrine means that states have some discretion when deciding on the administrative, judicial, or legal action that it wants to take to give effect to or limit a

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[18] Article 41.
[19] Articles 44-45
[20] See the text to part 3 6.
[21] *Soering v United Kingdom* Application 14038/88 (7 July 1989) para 87; *Handyside v United Kingdom* Application 5493/72 (7 December 1976) para 49. See also, Harris et al (2014) 7-8.
[22] *Wemhoff v Germany* Application 2122/64 (27 June 1968) para 8. See also, Harris DJ Harris, M O'Boyle, E Bates & C Buckley *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2014) 8.
[23] *Tyrer v United Kingdom* Application 5856/72 (25 April 1978) para 31.
[24] *Cosey v United Kingdom* Application 10843/84 (27 September 1990) para 35; *Christine Goodwin v United Kingdom* Application 28957/95 (11 July 2002) para 74: The ECtHR reformulated the approach adopted in *Cossey*, stating that "it is in the interest of legal certainty, foreseeability and equality before the law that [the ECtHR] should not depart, without good reason, from precedents laid down in previous cases". See also, Harris et al (2014) 21.
[25] Harris et al *Law of the European Convention on Human Rights* 18; Schabas *The European Convention on Human Rights* 33. See also, *Artico v Italy* Application 6694/74 (13 May 1980) para 33; Application 14038/88 (7 July 1989) para 87.
[26] Application 14038/88 (7 July 1989) para 89.
[27] *Christine Goodwin v United Kingdom* Application 28957/95 (11 July 2002) para 72.

right. However, this discretion remains "subject to European supervision".[28] The margin of appreciation doctrine exists because states often have a better understanding of whether a pressing social need necessitates the challenged restriction.[29] However, the margin of appreciation afforded to a state is contextual. It will be wide where, for example, the issue concerns the protection of public morals or raises sensitive moral or ethical issues. The margin afforded to states will also be wide where there is no consensus amongst Council of Europe members regarding the importance of the interest at risk or how to best protect it.[30] In contrast, it will be narrow where "a particularly important facet of an individual's existence or identity is at stake".[31] The application of this doctrine is discussed in detail in part 5 3 2 1 in relation to the prohibition of discrimination, as well as in part 5 3 2 2 concerning the right to respect for private life. Against this backdrop, it is important to note the significance of the adoption of Protocol 15. Once it comes into force, it will add a new recital to the Preamble, incorporating the margin of appreciation doctrine in the ECHR.[32]

5 2 2 2 European Social Charter and Revised Social Charter

The ESC was adopted in 1961 as the standard-setting economic and social rights charter of the Council of Europe. Evju explains that the ESC protects three categories of rights: (i) worker's rights; (ii) rights pertaining to social cohesion and the general population; and (iii) rights for the protection for vulnerable groups.[33] In this sense, it does not mirror the ICESCR.[34]

Part 1 declares that states parties to the ESC will pursue, through all appropriate means, the conditions for the effective realisation of the rights contained therein.[35] Part 1 is not binding but can add interpretive value to the rights enshrined under Part 2.[36] Part 2 is binding insofar

[28] Harris et al *Law of the European Convention on Human Rights* 14.
[29] Application 5493/72 (7 December 1976) para 48.
[30] *Evans v United Kingdom* Application 6339/05 (10 April 2007) para 77. See also, Application 28957/95 (11 July 2002) para 85; Harris et al *Law of the European Convention on Human Rights* 14.
[31] Application 6339/05 (10 April 2007) para 77.
[32] Article 1 of Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 24 June 2013) CETS 213: The envisaged amendment provides that states "have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".
[33] S Evju "The European Social Charter – Instruments and Procedures" (2007) 25 *Nordisk Tidsskrift for Menneskerettigheter* 61-62.
[34] See the text to part 4 4.
[35] Introduction to Part 1 of the ESC.
[36] O de Schutter "The Two Lives of the European Social Charter" in J Carlier, O De Schutter & M Verdussen (eds) *The European Social Charter: A social constitution for Europe* (2010) 15.

as states choose to be bound. This is because the ESC follows an *a la carte* approach.[37] In comparison, the ECHR binds Member States to all its provisions, unless a reservation in respect of a particular provision is deposited.[38]

Article 25 of the ESC created the Committee of Experts, now known as the ECSR. Articles 21 to 24 require that Member States submit reports outlining their compliance with the ESC.[39] The ECSR examines these reports and publishes conclusions outlining whether states are compliant with the ESC.[40] If not, states must legislate or adapt existing legislation and practices to bring it in line with the ESC.[41] Similar to the ECHR in respect of the ECtHR's judgments, the Committee of Ministers is responsible for ensuring compliance with the conclusions of the ECSR. Once the ECSR has adopted its annual conclusions, the Committee adopts a resolution in which it can make individual recommendations to states.[42] Furthermore, where a state is in non-compliance with a conclusion, the Committee is authorised to adopt a recommendation, requesting the state to address its shortcomings.[43]

As a result of its *a la carte* approach and the fact that the oversight of its implementation was limited to the publication of annual reports, the Council of Europe deemed the ESC and the ECSR as inefficient. Thus, a process was launched in November 1990 to "breathe new life into the European Social Charter and to re-establish the Council of Europe in setting human rights standards for the European continent".[44] This process resulted in two significant developments: (i) the adoption of a Revised European Social Charter in 1996; and (ii) the adoption of the Additional Protocol to the European Social Charter Providing for a System of

[37] Article 20(1) of the ESC. States have to bind themselves to a total of 10 articles or 45 numbered paragraphs, as well as to at least 5 of 7 core provisions

[38] Article 57(1) of the ECHR.

[39] Council of Europe "Governmental Committee of the European Social Charter – New system for the presentation of reports on the application of the European Social Charter" (3 May 2006) CM (2006)53: As of 2007, member states report annually on one of four thematic groups of rights contained in the ESC. Thus, state compliance in respect of each right is reviewed once every 4 years. These groups are: (i) employment, training and equal opportunities; (ii) health, social security and social protection; (iii) labour rights; and (iv) children, families, migrants.

[40] Article 27(1) of the ESC.

[41] Council of Europe "Follow-up of the Conclusions of the European Committee of Social Rights by the Committee of Ministers" *Council of Europe* <https://www.coe.int/en/web/european-social-charter/follow-up-by-the-governmental-committee-of-the-european-social-charter-and-the-european-code-of-social-security> (accessed 20-01-2010)

[42] Article 29 of the ESC.

[43] Council of Europe "Follow-up of the Conclusions of the European Committee of Social Rights by the Committee of Ministers" *Council of Europe*.

[44] De Schutter "The Two Lives of the European Social Charter" in *The European Social Charter* 12. See also, Para 2 of the Explanatory Report to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (9 November 1995) CETS 158.

Collective Complaints ("Collective Complaints Protocol") in 1995 to complement the state reporting procedure.[45]

The ESC(r) came into force in 1998 and does not replace the ESC. It contains the same guarantees that are listed in Part 2 of the ESC but reformulated in some instances. Thus, the ESC(r) enhances the rights protected under the ESC.[46] For purposes of this chapter, the most significant changes to the ESC are the reformulation of the right to education enshrined under Article 17 of the ESC(r) and the inclusion of an explicit prohibition of discrimination under Article E.[47]

The structure of the ESC(r) is the same as the ESC. Similar to the ESC, the ESC(r) too follows an *a la carte* approach.[48] Because the ESC(r) does not replace the ESC, states which have ratified the ESC, but not the ESC(r), remain bound to the former. However, where states have ratified the ESC(r), its undertakings in terms thereof supersede those under the ESC. States can simultaneously be bound by some provisions of the ESC and the ESC(r). This means that where states ratified some provisions of the ESC(r), but not those that correspond to similar provisions under the ESC, it will remain bound by the ESC in this respect.[49]

Member states to the ESC(r), like those to the ESC, also have to submit reports to the ECSR. Significantly, the Collective Complaints Protocol is incorporated in Article D(2) of the ESC(r). Thus, Member States to the ESC(r) do not have to make a separate declaration in this regard. The Collective Complaints Protocol provides a mechanism through which certain organisations may submit written complaints to the ECSR regarding the alleged non-compliance of a member state with provisions of the ESC that they are bound by.[50] The nature of collective complaints means that no individual matters may be submitted.[51] This approach is distinguishable from the ECtHR which allows both individual and inter-state complaints. A further difference between the ECHR and the ESC is that under the latter, domestic remedies do not have to be exhausted for a matter to be brought to the ECSR.[52]

In its consideration of compliance with the provisions of the ESC and the ESC(r), the ECSR undertakes an interpretive role. Like the ECtHR, the ECSR follows a teleological approach to

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[45] (adopted 3 May 1996, entered into force 5 May 1998) CETS 163; (adopted 9 November 1995, entered into force 1 July 1998) CETS 158.
[46] De Schutter "The Two Lives of the European Social Charter" in *The European Social Charter* 14.
[47] See the text to part 5 5.
[48] Article A(1)(b)-(c) of the ESC(r). Member States have to bind themselves to a total of 16 articles or 63 numbered paragraphs, as well as to at least 6 out of 9 core provisions.
[49] Article B.
[50] See Article 1 of the Collective Complaints Protocol. See also, Articles 2 and 4.
[51] Para 31 of the Explanatory Report to the Collective Complaints Protocol.
[52] De Schutter "The Two Lives of the European Social Charter" in *The European Social Charter* 23.

interpretation, as set out in the Vienna Convention. The Preamble of the ESC provides that the purpose thereof is to facilitate economic and social progress and to promote the social well-being of the urban and rural populations of its Member States without discrimination. It also refers to the ECHR and its role in the promotion of civil and political rights. The Preamble to the ESC(r) is similar to the ESC. Importantly, in *International Federation of Human Rights Leagues v France*[53], ECSR has noted that "[h]uman dignity is the fundamental value and indeed the core of positive European human rights law".[54] Thus, human dignity should frame the interpretation of all ESC and ESC(r) provisions.

In *FIDH v France* the ECSR set out the most important principles to the interpretation of the ESC and the ESC(r). First, the ESC complements the ECHR. In this regard, Khaliq and Churchill draw attention to that the ECSR also takes interpretative guidance from the ECtHR. Thus, where the ECHR contains a similar provision, the ECSR aims to interpret it in line with the approach of the ECtHR.[55] Second, according to the ECSR, the ESC and ESC(r) are:

> "[L]iving human rights instrument[s] dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity … Thus, the Charter[s] must be interpreted so as to give life and meaning to fundamental social rights.[56]

In *Defence for Children International v Belgium*[57], the ECSR explained that a teleological approach requires that the interpretation that is most appropriate to realising and promoting the aims objectives of the ESC(r) should be followed. Thus, rights should be made effective through the enactment of national legislation and the implementation of policies.[58]

5 3 European Convention on Human Rights

5 3 1 Human dignity as an underlying value

Unlike the international treaties discussed in chapter 4, the ECHR does not refer to human dignity in its Preamble or enshrine it as an explicit right in a substantive provision.[59] The

[53] Complaint 14/2003(8 September 2004) ("*FIDH v France*") para 31.
[54] Para 31.
[55] U Khaliq & R Churchill "The European Committee of Social Rights: Putting flesh on the bare bones of the European Social Charter" in M Langford (ed) *Social Rights Jurisprudence: Emerging trends in international and comparative law* (2008) 435.
[56] Complaint 14/2003(8 September 2004) paras 27 and 29; *World Organisation against Torture (OMCT) v Portugal* Complaint 20/2003 (7 December 2004) para 34.
[57] Complaint 69/2011 (23 October 2012) ("*DCI v Belgium*") para 30.
[58] *International Commission of Jurists v Portugal* Complaint 1/1998 (9 September 1999) para 32.
[59] See the text to parts 4 2 2, 4 3 1, 4 4 1, and 4 5 1. See also, Preamble of Protocol No 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All

travaux préparatoires of the ECHR do not explain the reason behind the lack of reference to human dignity.[60] Costa considers this absence surprising given that the rights guaranteed in the ECHR are similar to those of the UDHR. However, he explains that it might be a result of its "practical, pragmatic, and mechanism-oriented" nature, being to settle alleged violations of its provisions through the ECtHR.[61] Despite the lack of an explicit reference to human dignity, the ECtHR has nonetheless referred extensively thereto in finding violations of rights enshrined in the ECHR.

The ECtHR referred to human dignity as a requirement of judicial fairness,[62] in determining the standard of detention conditions[63] and in declaring corporal punishment as unlawful.[64] It has further been held that racial discrimination can constitute degrading treatment, insofar as it negates the human dignity of the victim.[65] The ECtHR's judgments pertaining to the human dignity of children and persons with non-heteronormative SOGIE are of particular relevance.

DMD v Romania[66] concerned an allegation that the ill-treatment of the applicant-child violated Article 3 of the ECHR, which enshrines the right to not be subjected to "inhuman or degrading treatment or punishment".[67] In determining whether there was a violation, the ECtHR focused on the best interests of the child and their right to human dignity as the foundation for protecting children against ill-treatment.[68] In this regard, attention was also drawn to children as a vulnerable group who require special measures of protection. Concerning human dignity as the underlying value of the CRC, the ECtHR held that respect for the dignity of the child requires that children grow up in an environment conducive to their development. As such, violence against children must be condemned and states "should strive to expressly and comprehensively protect children's dignity".[69] The approach adopted by the ECtHR in this matter confirms that the best interests of the child principle, further discussed in

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Circumstances (adopted; entered into force 1 July 2003) CETS 187: The purpose of Protocol 13 is to protect the right to life contained in Article 2 of the ECHR as a basic value of democratic societies. In its Preamble, protection of the right to life is connected to "the full recognition of the inherent dignity of all human beings".

[60] Schabas *The European Convention on Human Rights* 66.

[61] J Costa "Human Dignity in the Jurisprudence of the European Court of Human Rights" in C McCrudden (ed) *Understanding Human Dignity* (2013) 393 394.

[62] *Greece v United Kingdom* Application 176/56 (26 September 1958).

[63] *Svinarenko and Slyadnev v Russia* Applications 32541/08; 43441/08 (17 July 2014); *X v Turkey* Application 24626/09 (9 October 2012); *Van der Ven v Netherlands* Application 50901/99 (4 February 2003); *Kalashnikov v Russia* Application 47095/99 (15 July 2002); *Kudla v Poland* Application 30210/96 (26 October 2000).

[64] *Tyrer v United Kingdom* Application 5856/72 (25 April 1978).

[65] *Cyprus v Turkey* Application 25781/94 (10 May 2001).

[66] Application 23022/13 (3 October 2017).

[67] Paras 5 and 36.

[68] Para 49.

[69] Paras 50-51.

part 5 3, is integral to the interpretation of the ECHR insofar as the rights of the child are implicated. More importantly, human dignity is established as central to the development and protection against ill-treatment of the child.

Pretty v United Kingdom[70] is a significant judgment, as the ECtHR for the first time held that the "respect for human dignity and human freedom" lies at the core of the ECHR.[71] Like in *DMD v Romania*, the ECtHR in *Pretty* considered human dignity in its interpretation of what constitutes degrading treatment. It held that:

> "Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3".[72]

Based on this statement, the inherent human dignity of each person requires that they be treated in a manner that does not cause fear or humiliation. Rather, individuals should be treated with respect and concern for their being. In this regard, the ECtHR further established a link between human dignity and the right of individuals to respect for their private life, stating that private life includes the "physical and psychological integrity of a person".[73] Reading the right to private life in light of the underlying value of respect for human dignity, therefore, requires that "aspects of an individual's physical and social identity … such as, for example, gender identification, name and sexual orientation" be embraced.[74]

Christine Goodwin v United Kingdom[75] concerned an application by a gender affirmed transgender women, declaring that the state's lack of provision for legal gender recognition, and the resulting discrimination and humiliation suffered, infringed on various rights enshrined in the ECHR.[76] The ECtHR had to determine whether the right to respect for private life imposes a positive obligation on the state to provide for legal gender recognition.[77] To this end, the existence of uniform state practice had to be considered, as well as the balancing of the applicant's interests against those of the general public.[78]

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[70] Application 2346/02 (19 April 2002) ("*Pretty*")
[71] Para 65.
[72] Para 52.
[73] Para 61.
[74] Para 61.
[75] Application 28957/95 (11 July 2002) ("*Goodwin*").
[76] Para 60.
[77] Para 71.
[78] Para 72.

With regard to the existence of uniform state practice, reference was made to the rejection of previous similar claims.[79] However, in reiterating the object and purpose of the ECHR, the ECtHR indicated that consideration must be had to changing conditions and practices to determine the interpretation that would promote the most effective protection of human rights.[80] It discussed the increasing allowance in Council of Europe Member States of legal recognition after gender reassignment, as well as the "continuing international trend towards [post-operative] legal recognition".[81]

In weighing up the applicant's interests against those of the general public, the ECtHR cited *Pretty*, reiterating that respect for human dignity and human freedom is the essence of the ECHR. Reading human dignity with the right to respect for private life means that the "right of [transgender persons] to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy".[82] This statement was later developed in *XY v Turkey*.[83] Here, the ECtHR again drew attention to human dignity as the essence of the ECHR, stating that it requires that transgender person's right to development and security be guaranteed.[84]

The state in *Goodwin* could not show that post-operative legal gender recognition would be detrimental to the public interest. In comparison, the applicant suffered humiliation and discrimination as a result of her birth certificate reflecting that she was a man, including ostracisation in the workplace and being unable to claim a state pension at the retirement age for women.[85] The state's failure to afford her post-operative legal gender recognition resulted in continuous undignified treatment. As a result, it was held that "society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth".[86]

The approach adopted in *Goodwin* is similar to the interpretation of human dignity under the UDHR:[87] transgender persons should be afforded the same rights and to the same extent as other individuals. This a restatement of the notion that all persons are entitled to equal rights

[79] Application 28957/95 (11 July 2002) para 73. See also, *Sheffield and Horsham v United Kingdom* Applications 22985/93 and 23390/94 (20 July 1998); *X Y and Z v United Kingdom* Application 21830/93 (22 April 1997); *Cossey v United Kingdom* Application 10843/84 (27 September 1990); *Rees v United Kingdom* Application 9532/81 (17 October 1986).
[80] Application 28957/95 (11 July 2002) para 75.
[81] Para 84.
[82] Para 90.
[83] Application 14793/08 (10 March 2015).
[84] Para 58.
[85] Application 28957/95 (11 July 2002) paras 12-19.
[86] Para 90.
[87] See the text to part 4 2 2.

as a result of their inherent human dignity. Similarly, the ECtHR also ties human dignity to the individual's right to development, and the right to not be subject to treatment that negates the individual's self-worth. Thus, human dignity has been established as an underlying value of the ECHR.

5 3 2 Non-discrimination

5 3 2 1 Defining discrimination under Article 14

In 1949, the International Council of the European Movement adopted the first draft of the ECHR. This draft included the prohibition of discrimination based on "religion, race, national origin or political or other opinion".[88] The importance of the right to non-discrimination was discussed at various meetings at the Council of Europe, with an increasing focus on the inclusion of other prohibited grounds such as sex.[89] Article 14 is identical to Article 2 of the UDHR insofar as its prohibited grounds of discrimination are concerned.[90] Article 14 provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".[91]

The purpose of Article 14 is to ensure that the rights enshrined in the ECHR and its Protocols are guaranteed without discrimination. According to Gerards, the guiding principle of Article 14 is that no person should be "excluded from important social goods" and that all persons "should be able to take part in public life on an equal footing".[92] The prohibition of discrimination is, therefore, integral to each of the provisions in the ECHR and its Protocols. This means that similar to the ICESCR and the CRC, Article 14 is not a free-standing right.[93]

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[88] Schabas *The European Convention on Human Rights* 557. See also, Council of Europe "Preparatory work on Article 14 of the European Convention on Human Rights" (9 May 1967) CDH (67) 3 3.
[89] Schabas *The European Convention on Human Rights* 557-561.
[90] However, Article 14 goes further than Article 2, prohibiting discrimination based on "association with a national minority".
[91] Article 14 of the ECHR.
[92] J Gerards "Prohibition of Discrimination" in P van Dijk, F van Hoof, A van Rijn & L Zwaak (eds) *Theory and Practice of the European Convention on Human Rights* 5ed (2018) 997 997.
[93] See the text to parts 4 3 2 1, 4 4 2, 4 5 2, and 4 6 4 2. Because CEDAW focuses on the elimination of discrimination against women, discrimination underlies all the rights enshrines therein. There is no separate right to discrimination to invoke. With regard to the ICCPR, discrimination itself constitutes a violation, as was found in *Young v Australia*. However, considering the decisions of the HRC discussed, applicants tend to claim a violation of their right to non-discrimination in conjunction with a substantive right enshrined in the ICCPR.

Rather, it prohibits discrimination in relation to the rights enshrined in the ECHR. As such, a complaint of discrimination must be attached to a right. However, what sets the jurisprudence of the ECtHR apart, is that a violation of Article 14 can be found without a violation of the substantive right invoked.[94] Weiwei, with reference to *European Commission of Human Rights v Belgium*,[95] explains that:

> "[It is not] necessary to show an actual breach of one of the substantive rights. For example, a right may justifiably be restricted under one of the specified headings, but would amount to a breach of Article 14 if the restriction were applied in a discriminatory way".[96]

However, in the judgments discussed below, this did not occur. What happens more often is that once a violation of the substantive provision is found, the ECtHR does not consider the right to discrimination read with the substantive right. This is evident in the judgments discussed in part 5 3 2 2.

In determining whether there has been a violation of Article 14 read with a substantive provision of the ECHR, the first step is to determine whether the complaint of differential treatment falls within the scope of a protected right. Once this has been established, the second step is to consider whether there has been discrimination and whether the reason for the discrimination is based on one of the listed grounds of Article 14.[97]

Discrimination refers to where persons in comparable situations are treated differently or where persons whose situations are vastly different are treated the same.[98] Thus, the ECtHR has adopted a substantive understanding of discrimination whereby the circumstances of each individual applicant are taken into consideration. Discrimination can be direct or indirect.[99] This approach corresponds to the interpretation of the prohibition of discrimination under the ICCPR, ICESCR, CEDAW, and the CRC.[100]

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[94] *National Union of Belgian Police v Belgium* Application 4464/70 (27 October 1975) para 44; *European Commission of Human Rights v Belgium* Applications 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (23 July 1968) ("Belgian Linguistics") para B-9.

[95] Applications 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (23 July 1968).

[96] L Weiwei "Equality and Non-Discrimination Under International Human Rights Law" in BA Andreassen *Research Notes 03/2004* (2004) 1 189. See also, Applications 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (23 July 1968) para B-9.

[97] B Rainey, E Wicks & C Ovey *The European Convention on Human Rights* 7ed (2017) 641-642.

[98] *DH v Czech Republic* Application 57325/00 (13 November 2007) para 175; *Thlimmenos v Greece* Application 34369/97 (6 April 2000) para 44.

[99] See, Gerards "Prohibition of Discrimination" in *Theory and Practice* 1005; Application 57325/00 (13 November 2007) para 175. See also, *Oršuš v Croatia* Application 15766/03 (16 March 2010) para 150.

[100] See the text to parts 4 3 2 1, 4 4 2, 4 5 2, and 4 6 4 2.

Article 14 imposes both negative and positive obligations on states. Thus, states should not only refrain from discriminating against persons in guaranteeing their rights under the ECHR but should also take steps to prevent and address discrimination.[101] In determining whether discrimination exists, the question is whether the complainant is in a similar or analogous position to the group compared to. If not, there can be no discrimination. However, if the complainant is in a similar or analogous position, discrimination exists.[102] In this regard, it is significant that the ECtHR in *Çam v Turkey*[103] explained that reasonable accommodation informs Article 14.[104] Reasonable accommodation requires states to make the "necessary and appropriate modification and adjustments" in applying the law to ensure that it does not impose "a disproportionate or undue burden" on certain groups of individuals.[105] This is explored in more detail in part 5 3 3.

Article 14 provides an open-ended list of prohibited grounds of discrimination. The use of the terms "such as … or other status" indicates that Article 14 presents an illustrative, rather than a non-exhaustive list.[106] In this regard, the ECtHR in *Kjeldsen, Busk Madsen and Pedersen v Denmark*[107] held that "other status" in Article 14 refers to discrimination based on "personal characteristic ("status") by which persons or groups of persons are distinguishable from each other".[108] The case law discussed below shows how the right to respect for private life under Article 8 has been utilised to adopt a wide interpretation of "other status" to prohibit discrimination based on non-heteronormative SOGIE.

Once the applicant has shown that there is discrimination, the burden of proof shifts to the state to prove that it is justifiable. In matters concerning indirect discrimination, the applicant must establish a *prima facie* case before the burden of proof shifts to the state.[109] For differential treatment to be justifiable, it must be provided for in law and pursue a legitimate aim that is necessary in a democratic society.[110] As discussed in part 5 2 2 1, this requires balancing individual interests against that of the broader public.

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[101] *Identoba v Georgia* Application 73235/12 (12 May 2015) para 63.
[102] Gerards "Prohibition of Discrimination" in *Theory and Practice* 1014.
[103] Application 51500/08 (23 February 2016).
[104] Para 65.
[105] Para 65.
[106] *Engel v Netherlands* Applications 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (8 June 1976) para 72. See also, *Carson v United Kingdom* Application 42184/05 (16 March 2010) para 70.
[107] Applications 5095/71; 5920/72; 5926/72 (7 December 1976) ("*Kjelsden*").
[108] Para 56.
[109] *DH v Czech Republic* Application 57325/00 (13 November 2007) paras 177-178.
[110] *Norris v Ireland* Application 10581/83 (26 October 1988) para 39. See also, *Taddeucci and McCall v Italy* Application 51362/09 (30 June 2016) para 91; Application 57325/00 (13 November 2007) para 196; *Zarb Adami v Malta* Application 17209/02 (20 June 2006) paras 72-73.

Where differential treatment is based on a "suspect" ground, a strict test of justification applies. This means that "particularly weighty and convincing" reasons should be presented.[111] According to Gerards, "suspect" grounds "relate to personal characteristics salient to vulnerable, stigmatised groups, or to groups who have for a long time been subject to discrimination".[112] However, even in the presence of "suspect" grounds, the ECtHR will nonetheless consider the existence of uniform state practice and the nature of the right concerned in determining the margin of appreciation, discussed in 5 2 2 1, that should be afforded to states in a particular matter.

In relation to the rights of persons with non-heteronormative SOGIE, it is significant that the ECtHR is attaching increasing value to international legal developments and democratic ideals when weighing up the interests of the public with that of the individual. In this regard, Article 8 has been instrumental in establishing non-heteronormative SOGIE as prohibited grounds of discrimination, without the ECtHR finding a separate violation of Article 14.[113]

5 3 2 2 Role of Article 8 in establishing non-heteronormative SOGIE as prohibited grounds of discrimination

Since the start of the ECHR's drafting process, there was a call to include the rights that arise from "marriage and paternity", as well as those related to the family and the "sanctity of the home".[114] In speaking of the reason behind this, Teitgen recalls that in the then recent-past, in certain countries, people of certain races or religions were not afforded the right to marry and children were subordinated "to the benefit of the state".[115] According to the drafting committee:

[111] Application 51362/09 (30 June 2016) para 92.
[112] Gerards "Prohibition of Discrimination" in *Theory and Practice* 1019.
[113] With regard to the prohibition of discrimination under the ECHR, it is relevant to note the adoption of Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms in November 2000. The purpose of Protocol 12 is to strengthen protection against discrimination under the ECHR through. However, because it is not widely ratified, the ECtHR has not had much opportunity to interpret it. See also, *Baralija v Bosnia and Herzegovina* Application 30100/18 (29 October 2019) para 45. Finding a violation of Article 1 of Protocol 12 was found, the ECtHR explained that "whereas Article 14 of the Convention prohibits discrimination in the enjoyment of 'the rights and freedoms set forth in [the] Convention', Article 1 of Protocol No 12 extends the scope of protection to 'any right set forth by law'. It thus introduces a general prohibition on discrimination".
[114] Report of the Sitting of the Consultative Assembly (19 August 1949). See also, Schabas *The European Convention on Human Rights* 360.
[115] Report of the Sitting of the Consultative Assembly (7 September 1949). See also, Schabas *The European Convention on Human Rights* 361.

> "[If] the father of a family cannot be an independent citizen, cannot feel free within his own country, if he is menaced in his own home and if, every day, the State steals from his soul, or the conscience of his children".[116]

These statements communicate the importance of individual independence and the sacredness of private life to the drafters of the ECHR. The drafters drew inspiration from the UDHR and ultimately modelled Article 8 of the ECHR on Articles 12 and 29(2) of the UDHR.[117] Article 8 provides that:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".[118]

The reference to respect for the private life of the individual in Article 8(1) is relevant to the current discussion. Private life may not be interfered with unless it is justified under Article 8(2). Thus, Article 8(2) contains is own limitations clause. Like the grounds of justification established in the case of Article 14, an interference has to be provided for in law and be necessary in a democratic society. In this regard, the interests of the individual will have to be weighed against that of the general public.

Dudgeon v United Kingdom[119] is a landmark case under Article 8, as it is the first case in which a violation of the right to respect for private life was found as a result of discrimination based on the applicant's non-heteronormative sexual orientation. The applicant argued that the criminalisation of homosexual sexual activities in Northern Ireland infringed on his right to respect for his private life and caused him "fear, suffering and psychological distress".[120] The

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[116] Report of the Sitting of the Consultative Assembly (7 September 1949). See also, Schabas *The European Convention on Human Rights* 361.
[117] Schabas *The European Convention on Human Rights* 359; Article 12 of the UDHR provides that: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks". Article 29(2) of the UDHR provides that: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".
[118] Article 8 of the ECHR.
[119] Application 7525/76 (22 October 1981) ("*Dudgeon*").
[120] Para 37.

ECtHR found that there was a violation of the applicant's private life, establishing that an individual's sexual life forms part of his private life.[121]

The justification presented by the state was that the legislation in question was necessary in a democratic society as it was aimed at safeguarding moral interests.[122] According to the ECtHR, in order for an interference to be necessary in a democratic society, there has to exist a pressing social need. In this regard, states have a certain margin of appreciation in determining what it deems to be a pressing social need. However, because an individual's sexual life "concerns a most intimate aspect of private life", the state has to present "particularly serious reasons" to justify an interference.[123] Considering tolerance and broadmindedness as hallmarks of democratic societies, it was held that negative social attitudes towards male homosexual persons and the government's fear of eroding moral standards do not present reasonable justifications for the extent of the interference with the applicant's private life.[124]

The ECtHR's approach in *Dudgeon* was confirmed in *Smith and Grady v United Kingdom*[125] and in *Lustig-Prean and Beckett v United Kingdom*[126]. Both matters concerned the discharge of the applicants, from the army, based on their non-heteronormative sexual orientations.[127] The state argued that the restriction was justified because having homosexual men in the armed forces would negatively impact morale and, ultimately, decrease its "fighting power and operational effectiveness".[128]

The ECtHR indicated that states have a wide margin of appreciation where matters of national security are concerned. However, the state will still have to show that the restriction has a legitimate aim that is necessary in a democratic society, built on pluralism, tolerance, and broadmindedness.[129] Furthermore, reiterating *Dudgeon*, the ECtHR stated that serious justifications are required where restrictions involve an individual's sexual life, as a most intimate aspect of private life.[130]

The argument presented was that the operational effectiveness of the armed forces was at risk where homosexual service personnel were employed. However, in neither matter could the

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[121] Para 41.
[122] Para 47.
[123] Para 52.
[124] Application 7525/76 (22 October 1981) paras 53 & 62. See also, *A.D.T. v United Kingdom* Application 35765/97 (31 July 2000); *Modinos v Cyrpus* Application 15070/89 (22 April 1993); *Norris v Ireland* Application 10581/83 (26 October 1988).
[125] Applications 33985/96; 33986/96 (27 September 1999) ("*Smith and Grady*").
[126] Applications 31417/96; 32377/96 (27 September 1999) ("*Lustig-Prean*").
[127] Applications 33985/96; 33986/96 (27 September 1999) para 93.
[128] Para 95.
[129] Para 97.
[130] Para 89.

state substantiate their claims. As a result, it was found that the ban imposed on homosexual men preventing them from entering the armed forces was based on negative attitudes, which did not constitute a reasonable justification for the discrimination suffered.[131]

In various subsequent matters, the ECtHR referred to an individual's sexual life as a most intimate aspect of private life in affirming that serious reasons must be presented to restrict this right. In the judgments of *L and V v Austria*[132] and *Alekseyev v Russia*[133], the ECtHR reiterated that negative attitudes towards a particular group cannot constitute reasonable justification for discrimination based on sexual orientation.[134] Furthermore, in *Taddeucci and McCall v Italy*,[135] it was also held that the protection of traditional family values cannot be accepted as justification for restricting the right to respect for private life through refusing to grant a family residence permit to someone in a same-sex partnership.[136]

Against this background, the ECtHR has included the rights of persons with non-heteronormative SOGIE under respect for private life. This was possible as a result of the broad conception of private life. Private life has been held to encompass the right to establish relationships with other individuals, to personal development and to self-determination, as well as to include the right of each person to respect for their physical and psychological integrity, and their choices as to their desired appearance as an expression of their personality, whether in public or in private.[137]

In all the matters discussed here, the violations of the right to respect for private life were found to be a result of the applicants' non-heteronormative SOGIEs. Because matters of SOGIE are deemed one of the most intimate aspects of private life, the states involved had to provide serious reasons as justification for the restrictions imposed. The ECtHR's focus on respect for private life in protecting the rights of persons with non-heteronormative SOGIE goes back to the importance attached to individual independence and the sacredness of private life during the drafting of Article 8.

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[131] Para 97.
[132] Applications 39392/98; 39829/98 (9 January 2003).
[133] Applications 4916/07; 25924/08; 14599/09 (21 October 2010).
[134] Applications 39392/98; 39829/98 (9 January 2003) para 52; Applications 4916/07; 25924/08; 14599/09 (21 October 2010) para 78-79. See also, *Zhdanov v Russia* Applications 12200/08; 35949/11; 58282/12 (16 July 2019) para 152.
[135] Applications 51362/09 (30 June 2016).
[136] Para 94.
[137] See in general, *X v Former Yugoslav Republic of Macedonia* Application 29683/16 (17 January 2019); *S.A.S. v France* Application 43835/11 (1 July 2014); *EB v France* Application 43546/02 (22 January 2008); *Pretty v United Kingdom* Application 2346/02 (29 April 2002); *Bensaid v United Kingdom* Application 44599/98 (6 February 2001); *Niemietz v Germany* Application o 13710/88 (16 December 1992); *X and Y v Netherlands* Application 8978/80 (26 March 1985).

As discussed in part 5 3 2 1, the test applied under Article 14 to determine whether differentiation constitutes unjustifiable discrimination requires the state to prove that it has a legitimate aim, with the means adopted being reasonable and proportionate to the aim sought to achieve. In this determination, the general principles applicable in democratic societies are considered. This test is similar to the one prescribed to determine whether a violation of Article 8 is justifiable. As a result, it would be redundant for the ECtHR to consider whether there was a violation of Article 8 read with Article 14, where a violation of Article 8 has been found. However, it is important to point out that this approach does not mean that non-heteronormative SOGIE are not covered under discrimination based on "other status".

The case law discussed establishes that the rights of persons with non-heteronormative SOGIE are protected under the ECHR through the interpretation of the right to respect for private life. Importantly, the ECtHR's approach to protecting the rights of persons with non-heteronormative SOGIE is supported by the YP. The YP has only once been referred to by the ECtHR, and only in a dissenting opinion of Sajó, Keller and Lemmens JJ in *Hämäläinen v Finland*.[138] Furthermore, the applicants in *X v he former Yugoslav Republic of Macedonia*[139] also relied on the YP in their arguments. However, the ECtHR did not consider this. Nevertheless, these references have the potential of ultimately establishing the role of the YP as providing interpretive guidance when considering the positive and negative obligations imposed on states to respect, protect, promote, and fulfil the rights of persons with non-heteronormative SOGIE.

5 3 3 Education

As mentioned in part 5 2 2 1 above, Article 2 of Protocol 1 to the ECHR provides for the right to education. Article 5 indicates that Protocol 1 enshrines additional substantive rights to the ECHR. As a result, the rights and obligations imposed under the ECHR applies to Protocol 1 as well. Article 2 of Protocol 1 states that:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".[140]

[138] Application 37359/09 (16 July 2014) (joint dissenting opinion of judges Sajó, Keller & Lemmens).
[139] Application 29683/16 (17 January 2019).
[140] Article 2 of Protocol 1 to the ECHR.

The wording of Article 2 is different from the right to education contained in the international instruments discussed under chapter 4. Although the title of Article 2 is the right to education, the first sentence of the provision is couched in negative terms. It is also significant that reference is made to the right of parents in respect of their child's education.

In *Belgian Linguistics* the ECtHR, for the first time, ruled on the right to education.[141] It explained that the right to education should be accessible and effective and that the negative formulation of the right to education means that learners should at least have access to existing educational institutions and be able to benefit from education.[142] *Campbell and Cosans v United Kingdom*[143] added to this that the right to education includes knowledge instruction and should contribute to the development of the child's character and abilities.[144] Because of its importance to children's development, the ECtHR in *Timishev v Russia*[145] moreover held that, at the very least, the right to education includes the right to primary education.[146] However, in *Catan v Republic of Moldova and Russia*,[147] it was indicated that both primary and secondary education is fundamental to children's "personal development and future success".[148] As such, the right to education includes both primary and secondary education.[149] In light of these decisions, it is evident that the right to education under the ECHR is tied to the development of the child.

Furthermore, the state has an obligation to regulate education. Notably, in *Cosans*, the ECtHR explained that this should not be done in a manner that infringes on other rights and freedoms guaranteed under the ECHR or its Protocols.[150] Rather, the right to education should be interpreted in a manner that promotes the ideals of the ECHR and the importance attached to democratic values.[151] This is of particular importance in light of the broader societal function of the right to education as "indispensable to the furtherance of human rights".[152] In this regard, the ECtHR has drawn specific attention to the impact of the right to non-discrimination, respect for private life, and the right to freedom of thought, conscience and religion on education. This

[141] Applications1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (23 July 1968).
[142] Para B-4.
[143] Applications 7511/76; 7743/76 (25 February 1982) ("*Cosans*").
[144] Para 80.
[145] Applications 55762/00; 55974/00 (13 December 2005).
[146] Para 64.
[147] Applications 43370/04, 8252/05; 18454/06 (19 October 2012).
[148] Para 144.
[149] Para 144.
[150] Applications7511/76; 7743/76 (25 February 1982) para 41.
[151] Applications 5095/71; 5920/72; 5926/72 (7 December 1976) para 57.
[152] *Velyo Velev v Bulgaria* Application 16032/07 (27 May 2014) para 34.

is because these rights are integral to the development of the child.[153] The ECtHR has further indicated that Article 2 of Protocol 1 should be interpreted in light of the right to education as set out in the UDHR, ICESCR and the CRC.[154] Thus, the interpretation of the right to education set forth under chapter 4 is relevant to the interpretation of Article 2 of Protocol 1 of the ECHR.[155]

Considering the discussion in 5 3 2 in light of the right to education of the child, the argument set forth is that the right to non-discrimination and the protection of the private life of the child enshrined in the ECHR means that children with non-heteronormative SOGIE have a right to not be discriminated against in education. The state has a positive obligation to address regulations that cause fear and humiliation to children with non-heteronormative SOGIE and must implement preventative measures. This is based on the discussion in part 5 3 2 2 pertaining to the right to respect for private life as including respect for non-heteronormative sexual orientations, diverse gender identities and gender expressions as a most intimate aspect of a person's life.

The ECtHR's decision in *Çam v Turkey* is significant for setting out the positive obligations on states to ensure that all children can benefit from the right to equal education. The complainant, a blind woman, was denied enrolment in a tertiary education institution for failure to provide a medical certificate confirming her physical ability to attend and participate in the programme.[156] On the facts, the relevant medical certificate was presented, stating that the complainant "could receive education and instruction in the sections of the Music Academy where eyesight was unnecessary".[157] However, this was rejected by the institution.[158]

The point of departure in this matter was that the right to education is explicitly protected under the ECHR.[159] The ECtHR reiterated that the rights enshrined under the ECHR should be interpreted and applied practically and effectively.[160] In light thereof, attention was drawn to the universality and non-discrimination as internationally recognised principles that inform all rights, including the right to education.[161] Moreover, the ECtHR explained that inclusive

[153] Applications 43370/04, 8252/05; 18454/06 (19 October 2012) para 143*; Folgerø v Norway Application* 15472/02 (29 June 2007) para 84; Applications 5095/71; 5920/72; 5926/72 (7 December 1976) para 52.
[154] Applications 43370/04; 8252/05; 18454/06 (19 October 2012) para 136. See also, Applications 55762/00; 55974/00 (13 December 2005) para 64.
[155] See the text to parts 4 2 4, 4 3 3, and 4 6 4.
[156] Communication 51500/08 (23 February 2016) paras 12-15.
[157] Para 11.
[158] Paras 12-15.
[159] Para 52.
[160] Para 53.
[161] Para 64.

education is the "most appropriate means of guaranteeing the aforementioned fundamental principles".[162]

According to the ECtHR, Article 14 places an obligation on states to reasonably accommodate persons who will otherwise not be able to enjoy their rights on equal terms with other individuals.[163] Importantly, the ECtHR noted that reasonable accommodation in schools or other educational institutions can take various forms. It can be "physical or non-physical, education or organisational, [concern] the architectural accessibility of school buildings, teacher training, curricular adaption or appropriate facilities".[164] The decision to not reasonably accommodate the complainant was held to constitute discrimination based on the ground of disability because she could not enjoy her right to education on equal terms as other students.[165]

Importantly, the ECtHR's reasoning in *Çam v Turkey* can arguably be applied to the right to education of learners with non-heteronormative SOGIE. Considering the ECtHR's arguments, a state's refusal to, for example, include diverse SOGIE in the sexual education curriculum, allow transgender learners to wear the school uniform of their identified gender, or to ensure that learners with non-heteronormative SOGIE are not marginalised or discriminated against in schools, can constitute discrimination based on their non-heteronormative SOGIE and infringe on their right to equal education.

The second sentence of Article 2 provides parents with rights in respect of their children's education. The requirement that the rights of parents be respected implies that there is a positive obligation on the state to accommodate the religious and philosophical convictions of parents.[166] In *Kjelsden*, the ECtHR explained that respect for the religious and moral convictions of parents is based on safeguarding pluralism in education and to prevent indoctrination.[167] In *Valsamis v Greece*, religious convictions were clarified as referring to known religions.[168] In comparison, the ECtHR in *Cosans* indicated that philosophical convictions concern "such convictions as are worthy of respect in a 'democratic society'".[169] However, it should not conflict with the right to education or be incompatible with human

[162] Para 64.
[163] Para 65.
[164] Para 66.
[165] Paras 67-69.
[166] *Valsamis v Greece* Application 21787/93 (18 December 1996) para 27.
[167] Applications 5095/71; 5920/72; 5926/72 (7 December 1976) paras 50 and 53.
[168] Application 21787/93 (18 December 1996) para 25.
[169] Applications 7511/76; 7743/76 (25 February 1982) para 36. See also, Applications 5095/71; 5920/72; 5926/72 (7 December 1976) para 25.

dignity.[170] In this regard, the ECtHR's decision in *Cosans* is relevant. This matter concerned a school's refusal to allow a learner to attend the school because the learner's parents did not agree to the use of corporal punishment as it conflicted with their philosophical convictions. The ECtHR found that, not only did the school's refusal infringe on the learner's right to education but that the state's regulation of corporal punishment infringed on the learner's right to not be subjected to degrading treatment.[171]

Of further significance is the ECtHR's judgment in *Kjelsden*, where it was held that compulsory sex education does not infringe on the right of parents in respect of their children's education. Furthermore, this right of parents does not prevent states from teaching philosophical or religious materials, as long as it is done in an "objective, critical and pluralistic manner".[172] In *Dojan v Germany*[173], it was further confirmed that the regulation of education includes the "setting and planning of the curriculum" and that this can include philosophical or religious materials, as well as sexual education.[174] *Dojan* involved a claim that the liberal sexual education provided in German schools infringed on the right of parents to ensure the education of their children in terms of their religious convictions.[175] Reference was made to the aim of the sexual education curriculum as providing:

> "[P]upils with knowledge of biological, ethical, social and cultural aspects of sexuality according to their age and maturity in order to enable them to develop their own moral views and an independent approach towards their own sexuality. Sexual education should encourage tolerance between human beings irrespective of their sexual orientation and identity".[176]

It was held that these aims promote the pluralism envisaged under Article 2 of Protocol 1 and therefore, do not, infringe on the rights of parents.[177] This judgment supports the argument that the right to education focuses on the development of the child. Nonetheless, the ECtHR has not discussed the best interests of the child principle in relation to the right to education. However, it has been used in the interpretation of the right to respect for the private life of the individual,

[170] Applications 7511/76; 7743/76 (25 February 1982) para 36. See also, Applications 5095/71; 5920/72; 5926/72 (7 December 1976) para 25.
[171] Applications 7511/76; 7743/76 (25 February 1982) para 41.
[172] Applications 5095/71; 5920/72; 5926/72 (7 December 1976) paras 53-54.
[173] Application 319/08 (13 September 2011) ("*Dojan*").
[174] 12
[175] 12.
[176] 15.
[177] 13.

albeit referring to family reunification, child custody matter, and adoption.[178] As a result of the broad formulation of the principle, having to be considered in all matters concerning the child, it is arguably possible to apply those references to the right to education.

Strand Lobben v Norway[179] reiterates the best interests principle and sets out its current interpretation under the ECHR. As a point of departure, the ECtHR explained that under domestic and regional European law, there is broad consensus that the child's best interests are of paramount importance in all matters concerning the child.[180] It is, therefore, of "crucial importance" to consider what would be in the child's best interests in a particular situation.[181] The argument presented is that the child's best interests being of "crucial importance" can be interpreted as imposing more onerous obligations on the state than if it were just of "paramount importance". The ECtHR further indicated that where the best interests of the child conflict with those of their parents, a fair balance should be struck between these competing interests. In this regard, the "nature and seriousness" of the interests at stake should be considered to determine whether the child's interests should override those of the parents.[182] More recently, in its first advisory opinion, the ECtHR reiterated that "whenever the situation of a child is in issue, the best interests of that child are paramount".[183] What is in the child's best interests must also be assessed "*in concreto* rather than *in abstracto*".[184]

Despite the lack of reference to the best interests principle in the interpretation of Article 2 of Protocol 1 of the ECHR, the argument presented is that the case law of the ECtHR concerning the right of parents in respect of their children's education has considered the best interests of the child. In both *Kjelsden* and *Dojan*, reference was made to the aim of diverse sexual education to promote tolerance and the child's development of their own moral views. This approach is cognisant of a human rights-based approach to education, as discussed under chapter 4, and aims to give effect to the democratic values underlying the ECHR, as well as respect for human dignity as the essence thereof.[185]

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[178] See, *N.T.s v Georgia* Application 71776/12 (2 February 2016); *Mandet v France* Application 30955/12 (14 January 2016); *Tanda-Muzinga v France* Application 2260/10 (10 July 2014); *Chbihi Loudoudi v Belgium* Application 52265/10 (16 December 2014).
[179] Application 37283/13 (10 September 2019).
[180] Para 204.
[181] Para 210.
[182] Para 206.
[183] Request P16-2018-001 (10 April 2019) para 38.
[184] Para 52.
[185] See the text to parts 4 2 4, 4 3 3, and 4 6 4.

5 4 European Social Charter (1961)

5 4 1 Human dignity as an underlying value

During the drafting of the ESC, there was strong support for the inclusion of human dignity as the "basic principle of progressive social development in Europe".[186] The support stemmed from the idea that human dignity is central to the full development and moral well-being of all persons. According to Tóth, although the potential role of human dignity in the realisation of social and economic rights was discussed, it ultimately did not have a significant impact during the drafting process.[187] In the Preamble, human dignity was replaced with the "realisation of human rights and fundamental freedoms" as the overarching purpose of the ESC.[188]

The ECSR has referred to human dignity in determining violations of rights under the ESC. As a point of departure, the ECSR in its Interpretive Statement on Article 15 confirmed that:

> "The very essence of the Social Charter is to guarantee and respect the dignity of all human beings, irrespective of their physical or mental condition. The idea of human rights implies that the dignity of all individuals must be recognised and respected".[189]

According to the ECSR, human dignity underlies human rights to the extent that human rights cannot exist without it. As a human rights instrument, human dignity is implied in the ESC and underlies the rights provided therein.[190] The ECSR's judgments in *FIDH v France* and *Transgender Europe and ILGA-Europe v the Czech Republic*[191] confirm that "human dignity is the fundamental value and indeed the core of positive European human rights law".[192] Significantly, in *FIDH v France*, the ECSR held that, because both the ESC and the ESC(r) are

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[186] M A Tóth "The right to dignity at work: Reflections on Article 26 of the Revised European Social Charter" (2008) 29 *Comp Lab L & Pol'y J* 275 285. See also, Council of Europe "Memorandum of the Secretariat-General of the Council of Europe on the Role of the Council of Europe in the Social Field" (16 April 1953) SG (53) 1 5.
[187] Tóth (2008) *Comp Lab L & Pol'y* 288; Council of Europe "Consultative Assembly Committee on Economic Questions" (28 February 1956) AC/EC (7) 24 in *European Social Charter: Collected (Provisional) Edition of the "Travaux Préparatoires"* (1956) Vol III 65-66; Council of Europe "Recommendation 104 (1956) concerning a European convention on social and economic rights" (26 October 1956) in *European Social Charter: Collected (Provisional) Edition of the "Travaux Préparatoires"* (1956) Vol III 646-647.
[188] Preamble to the ESC. See also, Tóth (2008) *Comp Lab L & Pol'y* 288.
[189] ECSR "Statement of interpretation: Article 15" (30 November 1998) XIV-2.
[190] ECSR "Conclusions: Netherlands Antilles" (30 May 2003) XVI-1: In its Conclusions on the Netherlands Antilles, the ECSR indicated that the values of "dignity, equality and solidarity" lie at the heart of the ESC.
[191] Complaint 117/2015 (15 May 2018) ("*Transgender Europe*").
[192] Complaint 14/2003 (8 September 2004) para 31; Complaint 117/2015 (15 May 2018) para 72. See also, *International Planned Parenthood Federation - European Network (IPPF EN) v Italy* Complaint 87/2012 (10 September 2013) para 66.

living instruments dedicated to, and inspired by, human dignity, it should "be interpreted so as to give life and meaning to fundamental social rights".[193]

These two decisions illustrate that the ECSR reads human dignity as an underlying value of the ESC and aims to incorporate it in the interpretation of the rights contained therein. For example, in *Transgender Europe*, the ECSR found that setting sterilisation as a requirement for legal gender recognition violates the right to protection of health, contained in Article 11, because it disregards consent and violates the individual's physical integrity and human dignity.[194] Through this decision, the ECSR established that individual autonomy and bodily integrity is central to the inherent human dignity of each person.

The ECSR has also cited human dignity in considering children's right to social protection under Article 17 of the ESC. For example, public care institutions are required to "provide a life of human dignity for the children placed there and provide conditions promoting their growth, physically, mentally and socially".[195] The child's right to human dignity therefore necessitates that their environment facilitates their full development. Similarly, in *World Organisation against Torture (OMCT) v Portugal*,[196] the ECSR explained that children's right to social protection includes the right to be protected from all forms of violence. To this end, states have to prohibit all forms of violence against children and ensure that perpetrators are punished. Violence includes "acts or behaviour likely to affect the physical integrity, dignity, development or psychological well-being of children".[197] In this decision, the ECSR reiterated the connection between human dignity and the child's development, emphasising that the inherent dignity of the child demands that they be protected from violence. Related hereto, the ECSR in *Association for the Protection of All Children (APPROACH) Ltd v Czech Republic*[198] explained that violence against children, including corporal punishment, cannot be justified as it "erode[s] the child's absolute right to human dignity and physical and psychological integrity".[199]

The ECSR has also made numerous references in their Conclusions to human dignity in their interpretation of the various rights, most notably, the right to health, social and medical

[193] Complaint 14/2003 (8 September 2004) paras 27-29.
[194] Complaint 117/2015 (15 May 2018) para 83.
[195] ECSR "Conclusions: Poland" (30 June 2005) XVII-2.
[196] Complaint 34/2006 (5 December 2006) ("*OMCT v Portugal*").
[197] Complaint 34/2006 (5 December 2006) paras 19-21. See also, ECSR "Conclusions: United Kingdom" (4 December 2015) XX-4; *Defence for Children International (DCI) v Belgium* Complaint 69/2011 (23 October 2012) para 82.
[198] Complaint 96/2013 (20 January 2015) ("*APPROACH v Czech Republic*").
[199] Para 19.

assistance, as well as in the context of the right of mothers and children to social and economic protection. In this way, human dignity has been incorporated as a consideration for states in giving effect to the obligations imposed by the ESC.[200]

5 4 2 Non-discrimination

The Preamble to the ESC indicates that "social rights should be secured without discrimination".[201] Although there is no substantive provision that provides for non-discrimination, it can nonetheless be viewed as a foundational principle of the ESC.[202] In this regard, the ECSR in *European Roma Rights Centre v Greece*[203] explained that:

> "One of the underlying purposes of the social rights protected by the Charter is to express solidarity and promote social inclusion. It follows that States must respect difference and ensure that social arrangements are not such as would effectively lead to or reinforce social exclusion. This requirement is exemplified in the proscription against discrimination in the Preamble and in its interaction with the substantive rights of the Charter".[204]

In line with this judgment, the ECSR in *European Roma and Travellers Forum (ERTF) v Czech Republic*[205] stated that a person to whom a right accrues should be empowered to exercise that right. To this end, appropriate measures should be implemented to ensure that disadvantaged and vulnerable groups are not excluded from accessing their rights.[206] The ECSR held that restricting the Roma population's access to universal healthcare, as a group that is vulnerable to discrimination and social exclusion, impedes the effective exercise of their right to protection of their health. As such, the Czech Republic was found to have violated this right, read with the non-discrimination clause in the Preamble of the ESC.[207]

These two judgments illustrate the dual purpose of the non-discrimination clause in the Preamble to the ESC: (i) to promote respect for diverse peoples; and (ii) to provide a foundation

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[200] ECSR "Conclusions: Spain" (6 December 2013) XX-2; ECSR "Conclusions: Spain" (30 June 2005) XVII-2; ECSR "Conclusions: Poland" (31 October 2000) XV-1.
[201] Preamble to the ESC.
[202] *Greek General Confederation of Labour (GSEE) v Greece* Complaint 111/2014 (23 March 2017) para 108: In this matter, the ECSR referred to "the non-discrimination clause contained in the Preamble". Although a Preamble does not contain substantive provisions, it is clear that the ECSR places significant value on the principles set out in the Preamble to inform the interpretation of the rights under the ESC.
[203] Complaint 15/2003 (8 December 2004) ("*ERRC v Greece*").
[204] Para 19.
[205] Complaint 104/2014 (17 May 2016) "(*ERTF v Czech Republic*").
[206] Para 112.
[207] Para 128.

for protecting groups that are vulnerable to discrimination and exclusion. Because non-discrimination is provided for in the Preamble and not in a separate substantive provision, it must be attached to an allegation of the violation of a substantive right under the ESC.[208]

The ECSR has found violations of the right to non-discrimination when read with the right to work, the right of mothers and children to social and economic protection, as well as the right to protection of health. The ECSR showed that, although the prohibited grounds of discriminations in the Preamble seem to be a closed list, it is not. In this regard, reference has been made to the prohibition of discrimination based on gender and sexual orientation, amongst others.

With regard to the right to work, Article 1(2) of the ESC places an obligation on states to "protect effectively the right of the worker to earn his living in an occupation freely entered upon" and requires eradicating all forms of direct and indirect discrimination in employment.[209] In *Greek General Confederation of Labour (GSEE) v Greece*, it was held that anti-discrimination legislation should prohibit workers from being discriminated against based "*inter alia* on the grounds of … sexual orientation".[210] This judgment is significant as it confirmed the open-ended nature of the non-discrimination clause and included sexual orientation as a prohibited ground of discrimination under Article 1(2). This corresponds with the interpretation adopted under Article 14 of the ECHR, discussed in part 5 3 2 1, as well as the international treaties discussed in chapter 4.

Furthermore, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Croatia*[211] concerned an allegation that the Croatian government was in violation of Article 11(2) of the ESC read with the Preamble, for failing to "provide comprehensive or adequate sexual and reproductive health education for children".[212] Considering Article 11(2) together with the non-discrimination clause arguably means that sexual health education should be provided without discrimination, whether direct or indirect. The content of sexual health education therefore should not perpetuate prejudice or social exclusion.[213] The ECSR found that the depictions of persons with non-heteronormative sexual orientations in educational materials was "manifestly biased, discriminatory and

[208] See, Complaint 104/2014 (17 May 2016) para 228; Complaint 15/2003 (8 December 2004) para 19.
[209] Article 1(2) of the ESC; ECSR "Statement of Interpretation: Article 1(2)" (31 May 1969) I. See also, ECSR "Conclusions: Netherlands Antilles" (30 May 2003) XVI-1.
[210] Complaint 111/2014 (23 March 2017) para 133.
[211] Complaint 45/2007 (30 March 2009) ("*INTERIGHTS v Croatia*").
[212] Para 13.
[213] Para 48.

demeaning".[214] As a result, the Croatian government violated the positive duties imposed by Article 11(2) to ensure that:

> "[E]ducational materials do not reinforce demeaning stereotypes and perpetuate forms of prejudice which contribute to the social exclusion, embedded discrimination and denial of human dignity often experienced by historically marginalised groups such as persons of non-heterosexual orientation".[215]

Although the ECSR did not make explicit reference to sexual orientation as the relevant prohibited ground of discrimination, it nonetheless relied on the demeaning depictions of persons with non-heteronormative sexual orientation in establishing the violation. Based on *GSEE v Greece* and *INTERIGHTS v Croatia*, it is set forth that sexual orientation is a prohibited ground of discrimination under the non-discrimination clause in the Preamble of the ESC.

Like in *GSEE v Greece*, the ECSR in their Conclusions on the Czech Republic referred to various prohibited grounds of discrimination not listed in the Preamble. The ECSR indicated that, in a decision on the placement of a child in public care, the child should not be discriminated against based on their or their parent(s)'s "gender ... or any other status".[216] Of importance here is that the ECSR also recognised that the non-discrimination clause applies to the protection of children's rights under the ESC.

Transgender Europe could have been a landmark judgment establishing gender identity as a prohibited ground of discrimination under the ESC.[217] At issue was whether the Czech Republic was in violation of Article 11, read on its own or in conjunction with the right to non-discrimination in the Preamble, for requiring that transgender persons undergo sterilisation before being granted legal gender recognition.[218] In their decision, the ECSR considered the obligation on states to "take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life".[219] In this regard, states should provide "quick, transparent and accessible legal gender recognition procedures" without imposing a "prior obligation to undergo sterilisation or other medical procedures".[220]

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[214] Para 60.
[215] Para 61.
[216] ECSR "Conclusions: Czech Republic" (9 December 2011) XIX-4.
[217] Complaint 117/2015 (15 May 2018).
[218] Para 2.
[219] Complaint 117/2015 (15 May 2018) para 22. See also, Council of Europe "Recommendation CM/Rec (2010) 5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity" (31 March 2010) para 21.
[220] Complaint 117/2015 (15 May 2018) paras 23-24. See also, Council of Europe "Resolution 1728: Discrimination on the basis of sexual orientation and gender identity" (29 April 2010); Council of Europe "Resolution 2048: Discrimination against transgender people in Europe" (2 April 2015).

The complainants argued that requiring sterilisation for legal gender recognition constituted discrimination based on gender identity under the Preamble of the ESC. Unlike cisgender persons, whose sex and gender assigned at birth correspond, persons with non-heteronormative gender identities are not afforded the same privilege.[221] Although finding a violation of the right to protection of health, the ECSR refrained from considering the complaint in light of the prohibition of discrimination under the Preamble.[222] However, in a separate concurring opinion, Vice-President Lukas indicated that, given the facts of the case, the ECSR's refusal to engage with the allegation of discrimination was difficult to understand. According to Vice-President Lukas:

> "[The] difference in treatment [between cisgender and transgender individuals] lacks an objective and reasonable justification. Under international human rights law, medical treatment may only be imposed in emergency situations for the benefit of the health of the individual concerned, where that individual is not able to give his or her consent. Sterilisation for the purposes of legal gender recognition clearly does not meet these conditions and is therefore in grave violation of Article 11(1) and the Preamble to the 1961 Charter".[223]

Because the ECSR chose not to engage with the issue of discrimination based on gender identity in this matter, there is still no explicit pronunciation by the ECSR on the prohibition of discrimination based on non-heteronormative gender identities or gender expressions under the ESC. However, it is possible to argue that, in referring to gender as a prohibited ground of discrimination in their Conclusions on the Czech Republic, Turkey, and Spain, the ECSR has established an avenue through which discrimination based on non-heteronormative gender identities and gender expressions can be prohibited.[224]

As the two regional human rights bodies of Europe, the ECtHR draws from the ECSR, and vice versa. As a result, it is conceivable that the interpretation of gender as including non-heteronormative gender identities and gender expressions under the ECHR will be incorporated under the ESC in the future. It is further significant that the ECSR referred to Resolutions 1728 and 2048 of the Council of Europe in their judgment in *Transgender Europe*, which concerns the prohibition of discrimination based on sexual orientation and gender identity in the member

[221] Complaint 117/2015 (15 May 2018) para 55.
[222] Para 88: "The Committee however considers that while there may be discrimination issues in the complaint, as the complaint has been lodged under the 1961 Charter the Committee will not consider the complaint in light of the Preamble to the 1961 Charter".
[223] Complaint 117/2015 (15 May 2018) (Separate concurring opinion of Karin Lukas) paras 6-9.
[224] ECSR "Conclusions: Spain (Article 14(2))" (6 December 2013) XX-2; ECSR "Conclusions: Czech Republic (Article 17)" (9 December 2011) XIX-4; ECSR "Conclusions: Turkey (Article 1(2))" (30 May 2003) XVI-1.

states of the Council of Europe.[225] The incorporation of these resolutions indicates the commitment of the ECSR to uphold the standards set by the Council of Europe. These resolutions will likely be integral to establishing non-heteronormative gender identities and gender expressions as a prohibited ground of discrimination under the ESC. It is also important to note that, in *Transgender Europe and ILGA-Europe v the Czech Republic*,[226] the applicants relied on the YP in their arguments before the ECSR. Although the ECSR did not draw from the principles in considering the merits of the complaint, its relevance was still not denied. As such, the principles have potential for guiding future developments under the ESC and the ESC(r).

5 4 3 An implied right to education

The ESC does not provide an explicit right to education for children as in Protocol 1 of the ECHR or the international human rights treaties discussed under chapter 4. Consideration was first given to the possibility of including a right to education in the Preliminary Draft of the Social Charter submitted in April 1955, two years after the drafting of the ESC started.[227] It was described as a right related to social and cultural development and was drafted with similar wording to the right to education contained in the UDHR.[228] Education was further mentioned in respect of the rights of children in general.[229] However, the drafting committee expressed its doubts as to whether the right to education should form part of the ESC, since it is enshrined in Protocol 1 to the ECHR, as well as in the UDHR and the draft of the CESCR.[230] What followed was an intense debate as to whether the right to education should be included, and if it was, how it should be worded.[231] As a result of the disagreement amongst states – particularly Germany, Italy, France, and Belgium – it was decided that an explicit right to education should

[225] Complaint 117/2015 (15 May 2018) paras 23-24. See also, Council of Europe "Resolution 1728: Discrimination on the basis of sexual orientation and gender identity" (29 April 2010); Council of Europe "Resolution 2048: Discrimination against transgender people in Europe" (2 April 2015).
[226] Complaint 117/2015 (15 May 2018).
[227] Working Party for the Preparation of a Draft European Social Charter: Preliminary Draft of Social Charter submitted by the Secretariat of the Committee (19 April 1955) AS/Soc I (6).
[228] Part II, Section D, Article 1. See, 4 2 4.
[229] Part II, Section B, Article 2; Part II, Section C, Article 3.
[230] Report of the Working Party appointed to draft articles for a European Social Charter (12 April 1957) CE/Soc (57) 5.
[231] See in general, Council of Europe, European Social Charter: Collected (provisional) edition of the "travaux préparatoires" Vol II (1955); Council of Europe, European Social Charter: Collected (provisional) edition of the "travaux préparatoires" Vol III (1956); Council of Europe, European Social Charter: Collected (provisional) edition of the "travaux préparatoires" Vol IV (1957).

be excluded from the draft of the ESC, but that the references to education in relation to the protection of children, in general, should be kept.[232]

Despite the absence of an explicit right to education, the ECSR has nonetheless inferred the right to education from Article 7. Article 7 enshrines the right of children and young persons to protection from the dangers associated with their employment. In *International Commission of Jurists v Portugal*,[233] the ECSR held that the purpose of Article 7 is to protect children from "risks associated in performing work which may have negative repercussions on their health, their moral welfare, their development and their education".[234] In this regard, Article 7(3) is relevant for stating that "persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education".[235] In its Interpretive Statement on Article 7(3), the ECSR confirmed that this provision places an obligation on states to prohibit such employment.[236] The ECSR's reference to that children should not be placed in a position that undermines their education, specifically where they are "still subject to compulsory education", implies that a right to education exists under the ESC.

Article 17 concerns the right of mothers and children to social and economic protection and places an obligation on states to implement measures and establish or maintain institutions for this purpose. Article 17 has been discussed in relation to protecting children in public care, as well as protecting children from abuse.[237] With regard to protection from abuse, the ECSR in *APPROACH v Czech Republic* reiterated their judgment in *World Organisation against Torture (OMCT) v Greece*,[238] stating that Article 17 necessitates all violence against children to be prohibited and penalised, including corporal punishment.[239] This requires that corporal punishment be prohibited in public and private spaces, including in schools.[240]

The argument presented is that Article 7 read with Article 17 establishes that children have a right to education under the ESC. This right is not explicit but is inferred from the obligation imposed on states to implement measures to protect children from the negative repercussions that employment can have on their access to and benefit from education. Furthermore, states

[232] Conclusions of the fifty-seventh meeting of the Ministers' Deputies (24-29 March 1958) 23.
[233] Collective Complaint 1/1998 (9 September 1999).
[234] Para 26.
[235] Article 7(3) of the ESC.
[236] ECSR "Statement of Interpretation: Article 7(3)" (31 July 1971) II.
[237] ECSR "Statement of Interpretation: Article 7(10)" (31 December 2001) XV-2.
[238] Collective Complaint 17/2003 (7 December 2004).
[239] Complaint 96/2013 (20 January 2015) para 48.
[240] Complaint 96/2013 (20 January 2015) para 50. See also, Collective Complaint 17/2003 (7 December 2004) para 41; ECSR "Conclusions: United Kingdom" (9 December 2011) XIX-4; ECSR "Statement of Interpretation: Article 17" (31 December 2001) XV-2.

should ensure that children are not subject to violence in schools. In this regard, the ECSR in *APPROACH v Czech Republic* reiterated that children should be protected from violence because it can negatively affect their "physical integrity, dignity, development or psychological well-being".[241]

Considering Article 11(2) in light of Articles 7 and 17, the right to education also includes the right to "comprehensive or adequate sexual and reproductive education for children".[242] In *INTERIGHTS v Croatia*, discussed in 5 4 2, the Croatian government was found to be in violation of Article 11(2) for failing to provide such education. According to the ECSR, the purpose of sexual health education is to develop children's understanding of their "sexuality in its biological, psychological, socio-cultural and reproductive dimensions" in order to "enable them to make responsible decisions with regard to sexual and reproductive health behaviour".[243] The Croatian government violated Article 11(2) through its discriminatory portrayal of persons with non-heteronormative sexual orientations in educational materials.[244] Article 11(2), therefore, places an obligation on states to ensure that educational materials do not perpetuate direct or indirect discrimination or marginalisation.[245] This obligation implies that sexual health education should cover the full spectrum of human SOGIE in order to provide for each child's SOGIE.

Unlike in respect of the instruments discussed under chapter 4 above, the ESC has not presented a clear interpretation of the best interests principle. Sparse references have been made thereto in their Conclusions on Spain and the Czech Republic, where the ECSR indicated that the best interests of the child should be taken into consideration in determining the limitation of the custodial rights of parents under Article 17.[246] Based on these references, it is arguable that, under the ESC, determining what would be in the best interests of the child in a particular situation should focus on the child, and not on the parents' perception of what would be in their child's best interests.

The best interests principle has only been mentioned in one case under the ESC. In *APPROACH v Czech Republic*, the ECSR quoted from General Comment 13 of the CRC Committee, where it is stated that "all forms of violence against children, however light, are

[241] Complaint 96/2013 (20 January 2015) para 48. See also, Complaint 34/2006 (5 December 2006) paras 19-21.
[242] Complaint 45/2007 (30 March 2009) para 13.
[243] Para 45.
[244] Para 60.
[245] Para 61.
[246] ECSR "Conclusions: Spain" (4 December 2015) XX-4. See also, ECSR "Conclusions: Czech Republic" (9 December 2011) XIX-4.

unacceptable".[247] To determine whether particular conduct constitutes violence, states have to consider whether there exist "intervention strategies in order to allow proportional responses in the best interests of the child".[248] However, such factors should never "erode the child's absolute right to human dignity and physical and psychological integrity by describing some forms of violence as legally and/or socially acceptable".[249]

Considering the discussions in 5 4 1 and 5 4 2 respectively, the argument set forth is that all children, regardless of their SOGIE, are guaranteed a right to education under the ESC. Because human dignity lies at the core of the ESC, it necessarily informs each child's right to education. The right to human dignity adds to the right to education that children should grow up in an environment that promotes their development. This requires that children are protected from all forms of violence, including bullying and discrimination, in public and private spaces. Considering the discussion in part 5 4 2 in relation to the prohibition of discrimination in the Preamble of the ESC in light of the right to education, there is an obligation on states to ensure that all children have access to education and that they are empowered to benefit from the opportunities that this right offers on an equal basis. This requires that educational materials are unbiased in their depiction of diverse SOGIE's and that non-heteronormative SOGIE's are not excluded from these materials. Furthermore, equal access to the benefits that education offers requires that children not be subjected to violence in educational settings. This necessitates that discrimination based on non-heteronormative SOGIE perpetrated by learners, parents and teachers in schools be addressed.

Unlike in the international treaties discussed under chapter 4, no reference has been made to whether the best interests of the child are a primary consideration or the paramount consideration under the ESC. However, when considering the child's right to education, it is nonetheless necessary to consider what would be in the child's best interest when giving effect to this right. In light of this discussion, the argument presented is that it is in the best interests of the child to have equal access to education and to not be discriminated against in the context of education. The basis of this is that discrimination, on whichever ground, can have a detrimental effect on their full development and their abilities to benefit from the various opportunities that education offers.

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[247] Complaint 96/2013 (20 January 2015) para 19. See the text to part 4 5 1. See also, CRC Committee "General Comment 13" para 17.
[248] Complaint 96/2013 (20 January 2015) para 19; CRC Committee "General Comment 13" para 17.
[249] Complaint 96/2013 (20 January 2015) para 19. See the text to part 4 5 1. See also, CRC Committee "General Comment 13" para 17.

5 5 Revised European Social Charter (1996)

5 5 1 An explicit right to human dignity

Unlike the ESC, the ESC(r) contains an explicit reference to human dignity. Article 26 enshrines the "right of all workers to protection of their dignity at work" and is the only explicit reference to human dignity in the ESC(r). Article 26 was included as a result of increasing concern over allegations of sexual harassment and victimisation in the workplace.[250] It imposes obligations on states to protect workers from sexual harassment and "reprehensible or distinctly negative and offensive action" through promoting awareness and implementing preventive measures.[251] Whereas sexual harassment refers to unwanted sexual conduct from a superior or colleague, "reprehensible or distinctly negative and offensive action" refers to moral harassment that creates a hostile working environment.[252]

The Council of Europe has found that a person who harasses often does so to violate the victim's human dignity, with the harassment also drawing on a personal attribute of the victim that has been recognised as a prohibited ground of discrimination.[253] The argument presented is that the interpretation of Article 26, by analogy, provides essential insights for understanding the marginalisation and discrimination that children with non-heteronormative SOGIE often face in educational environments. This is because the work and education environments are similar, with peers as colleagues and teachers as superiors. The intention of discriminating against children with non-heteronormative SOGIE is also to violate their human dignity, communicating that their non-conformance with societal standards of SOGIE make them unworthy of respect and concern.

Even though Article 26 contains the only explicit reference to human dignity under the ESC(r), the ECSR has nonetheless considered various other rights in light of human dignity. These include the right to social and medical assistance, adequate housing, the right of children to protection, as well as non-discrimination. The ECSR can read human dignity into these provisions because the ESC(r) is a living instrument inspired by human dignity. Thus, its provisions should be interpreted in a manner that not only gives content to the rights enshrined

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[250] Tóth (2008) *Comp Lab L & Pol'y* 289.
[251] Article 26(1)-(2).
[252] Council of Europe "European Social Charter (revised) Explanatory Report" (3 May 1996) ETS 163 para 99; ECSR "Statement of Interpretation: Article 26(2) (Moral Harassment) 2007_Ob_5/Ob/EN. See also, Tóth (2008) *Comp Lab L & Pol'y* 299 & 306.
[253] Council of Europe, "European Social Charter (revised) Explanatory Report" (3 May 1996) ETS 163 para 100. See also, Tóth (2008) *Comp Lab L & Pol'y* 307.

therein, but that reflects human dignity as an underlying value.[254] In this regard, the ECSR in *FIDH v France* explained that the rights contained in Articles 1-17 of the ESC(r) are of "fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being".[255] This means that any restriction of a right contained in the ESC(r) can be viewed as an infringement on the individual's human dignity unless sufficient justification is provided for the limitation in terms of Article E.

In terms of the protection of children, the ECSR in *Defence for Children International (DCI) v Netherlands*[256] explained that the inherent human dignity of the child entitles them to all the fundamental rights provided to adults.[257] Furthermore, in *Defence for Children International (DCI) v Belgium*[258], reference was made to the need to protect children from negligence and violence in order to protect their most basic rights and to ensure respect for their human dignity.[259] Similarly, in *Equal Rights Trust (ERT) v Bulgaria*, the ECSR stated that the child's right to protection requires that, when considering the limitation of their rights, their best interests be taken into account.[260] Related hereto, the ECSR in *Association for the Protection of All Children (APPROACH) Ltd v France* specified that corporal punishment infringes on the child's right to protection from violence guaranteed by Article 17 of the ESC(r) because it violates their human dignity.[261]

5 5 2 Non-discrimination

The purpose of the ESC(r) is to "strengthen solidarity and promote social inclusion" with Article E aiming to give effect hereto through prohibiting discrimination in ensuring the rights guaranteed under the ESC(r).[262] Significantly, non-discrimination was included as a separate provision under the ESC(r). The separate right to non-discrimination indicates that the drafters appreciated the role of a separate right to non-discrimination in ensuring the equal rights of all

[254] Complaint 14/2003 (8 September 2004) paras 26-27.
[255] Paras 30-31. See also, *Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v France* Complaint 114/2015 (24 January 2019) para 57; *Centre on Housing Rights and Evictions (COHRE) v Italy* Complaint 58/2009 (25 June 2010) para 33.
[256] Complaint 47/2008 (20 October 2009) ("DCI v Netherlands").
[257] Para 25.
[258] Complaint 69/2011 (23 October 2012) ("DCI v Belgium").
[259] Para 82.
[260] Complaint 121/2016 (16 October 2018) para 53.
[261] Complaint 92/2013 (12 September 2014) paras 36-37.
[262] *European Roma Rights Centre (ERRC) v Portugal* Complaint 61/2010 (30 June 2011) para 18.

persons under the ESC(r).[263] Unlike the international instruments discussed under chapter 4 and Article 14 of the ECHR discussed in part 5 3 2 1, Article E follows after the substantive provisions of the ESC(r). However, its location does not affect its importance and is a result of the structure of the ESC.[264] The wording of Article E is identical to Article 14 of the ECHR.[265]

Despite being a separate provision under the ESC(r), Article E is not an autonomous right. An applicant has to allege a violation of a substantive right under the ESC(r) and can then argue that the alleged violation also constitutes discrimination under Article E.[266] For a violation of the ESC(r) to be found, there has to be (i) differential treatment; (ii) based on one of listed grounds or "other status" under Article E; (iii) without an objective reason or legitimate aim; with (iv) the differentiation constituting an infringement of one of the substantive rights contained in the ESC(r).[267]

Article E prohibits both direct and indirect discrimination.[268] Where an applicant presents credible evidence of an alleged violation, the burden of proof shifts to the respondent state to demonstrate that the limitation is "prescribed by law and [is] necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals".[269] Comparable to the ECHR, the margin of appreciation doctrine is central. States have a margin of appreciation in deciding which measures to adopt in order to ensure compliance with their obligations under the ESC(r). In terms hereof, states should seek to strike a balance between the competing interests of the general public and those of a specific group.[270] However, a limitation will only be justifiable where it pursues a legitimate aim, with a reasonable and proportional relationship existing between the aim and the means adopted to realise it.[271]

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[263] *International Association Autism-Europe v France* Complaint 13/2002 (4 November 2003) para 51. See also, *Associazione sindacale "La Voce dei Giusti" v Italy* Complaint 105/2014 (18 October 2016) para 63; *Associazione Nazionale Giudici di Pace v Italy* Complaint 102/2013 (5 July 2016) para 70.
[264] See the text to part 5 2 2 2.
[265] See the text to part 5 3 2 1.
[266] Complaint 13/2002 (4 November 2003) para 51.
[267] *Confederazione Generale Italiana del Lavoro (CGIL) v Italy* Complaint 91/2013 (12 October 2015) para 236; *Confédération Française Démocratique du Travail (CFDT) v France* Complaint 50/2008 (9 September 2009) para 45. See also, *Syndicat national des Professions du Tourisme v France* Complaint 6/1999 (10 October 2000) paras 24-25.
[268] See, Complaint 119/2015 (5 December 2017) paras 108-109; Complaint 102/2013 (5 July 2016) para 70; Complaint 105/2014 (18 October 2016) para 63; Complaint 91/2013 (12 October 2015) para 236; Complaint 13/2002 (4 November 2003) para 52; Complaint 6/1999 (10 October 2000) paras 24-25.
[269] Article G of the ESC(r). See also, *Mental Disability Advocacy Center (MDAC) v Bulgaria* Complaint 41/2007 (3 June 2008) para 52; *Médecins du Monde-International v France* Complaint 67/2011 (11 September 2012) para 38; Complaint 61/2010 (30 June 2011) para 23; *European Roma Rights Centre (ERRC) v Italy* Complaint 27/2004 (7 December 2005) para 24.
[270] *European Roma Rights Centre (ERRC) v Bulgaria* Complaint 31/2005 (18 October 2006) para 35.
[271] *European Roma Rights Centre (ERRC) v France* Complaint 51/2008 (19 October 2009) para 82.

In an indirect discrimination claim, the applicant in *International Association Autism-Europe v France*[272] alleged that the French government was in violation of Article E, read with Articles 15(1) and 17(1) of the ESC(r), for not adopting sufficient measures to "secure children and adults with autism a right to education as effective as that of all the other children".[273] The applicant argued that this violated the rights of disabled persons that are protected under Article 15(1). Although disability is not listed as a prohibited ground of discrimination under Article E, the ECSR held that it can nonetheless be incorporated through the open-ended reference to "other status". [274] This approach corresponds to that under Article 14 of the ECHR.

With reference to Article 14 of the ECHR and the ECtHR judgment in *Thlimmenos v Greece*, the ECSR in *Autism-Europe* explained that Article E places an obligation on states to provide equal access to and enable the effective exercise of all rights despite the potential differences between people.[275] In this regard, the ECtHR in *Thlimmenos* held that states violate the right to non-discrimination when it "without an objective and reasonable justification fail to treat differently persons whose situations are significantly different".[276]

The ECSR incorporated *Thlimmenos* in its interpretation of Article E, stating that human difference should be celebrated and requires that states adopt practical measures to "ensure real and effective equality".[277] The ECSR's approach in *European Roma and Travellers Forum (ERTF) v France* adds to the *Autism-Europe* judgment that discrimination should be eliminated in law and fact.[278] To this end, states should address systemic discrimination, defined as "legal rules, policies, practices or predominant cultural attitudes, in either the public or private sector, which create relative disadvantages for some groups, and privileges for other groups".[279] Ultimately, systemic discrimination engenders social exclusion.

Although this interpretation can impose onerous administrative and financial obligations on states to address discrimination, the ECSR in *Autism-Europe* explained that this does not exempt it from its duties under Article E. States should adopt an incremental approach that enables it to realise the aims set out under the ESC(r) "within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available

[272] Complaint 13/2002 (4 November 2003) ("*Autism-Europe*").
[273] Para 7.
[274] Para 51.
[275] Para 51.
[276] Application 34369/97 (6 April 2000) para 44.
[277] Complaint 13/2002 (4 November 2003) para 52.
[278] Complaint 64/2011 (24 January 2012) paras 41-42.
[279] CESCR "General Comment 20" para 12.

resources".[280] However, states should be "mindful of the impact that [its] choices will have for groups with heightened vulnerabilities".[281]

In light of the discussion under chapters 1 and 2 above, persons with non-heteronormative SOGIE are vulnerable to discrimination for not conforming to heteronormative conceptions of sexual orientation, gender identities and expressions. Non-heteronormative SOGIE has not been established as prohibited grounds of discrimination under Article E of the ESC(r). However, the ECSR has discussed the obligations on states to address discrimination based on sexual orientation and transgender status in their Conclusions. In this regard, the ECSR has provided that, despite sexual orientation not being listed as a prohibited ground of discrimination, it can nonetheless be included under the reference to "or other status".[282] In discussing Article 1(2), which places an obligation on states to protect the right to work, the ECSR has indicated that national legislation should prohibit discrimination based on sex and sexual orientation in employment.[283] Furthermore, states should ensure that "services managed by the private sector are effective and accessible on an equal footing to all, without discrimination on grounds of … sexual orientation".[284] In the context of Article 1(2), the ECSR has also expressed concern over discrimination against persons with non-heteronormative SOGIE as a vulnerable group. The ECSR has, therefore, requested states to report on "what concrete measures are being taken to eliminate discrimination against such persons".[285]

Besides the concern expressed over discrimination against transgender persons, the ECSR has not discussed the application of the rights under the ESC(r) to transgender persons or persons with non-heteronormative gender identities or expressions. In their Conclusions published at the end of 2017, the ECSR requested information from various states as to whether transgender persons are required to undergo legal sterilisation or similar invasive procedures for legal gender recognition, and if it is a requirement, to provide justification or a commitment to remove it. The ECSR alluded to that this practice infringes on persons with non-heteronormative gender identities or expressions right to protection of their health and physical

[280] Complaint 13/2002 (4 November 2003) para 53.
[281] Para 53.
[282] ECSR "Conclusions: Azerbaijan" (7 December 2012) 2012/def/AZE/1/2/EN.
[283] ECSR "Conclusions: Ukraine" (7 December 2012) 2012/def/UKR/1/2/EN. See also, ECSR "Conclusions: Sweden" (30 June 2006) 2006/def/SWE/1/2/EN.
[284] ECSR "Conclusions: Portugal" (8 December 2017) 2017/def/PRT/14/2/EN. See also, ECSR "Conclusions: Estonia" (6 December 2013) 2013/def/EST/14/2/EN.
[285] ECSR "Conclusions: Albania" (7 December 2012) 2012/def/ALB/1/2/EN. See also, ECSR "Conclusions: Ukraine" (9 December 2016) 2016/def/UKR/1/2/EN.

integrity under Article 11(1).[286] The states involved are expected to provide this information in their State Reports on the health, social security and social protection provisions of the ESC(r) due in 2021.

5 5 3 Education

One of the most significant changes to the ESC(r) was made in respect of Article 17. Whereas Article 17 of the ESC enshrines the right of mothers and children to social and economic protection, Article 17 of the ESC(r) provides for the right of children to social, legal and economic protection. The ESC(r) removed the reference to mothers and focuses on the protection of children. The purpose of Article 17 is to ensure that children "grow up in an environment which encourages the full development of their personality and their physical and mental capacities".[287] It is founded on the CRC and aims to give effect to the rights contained thereunder. As a result, the CRC is incorporated under Article 17 and informs its interpretation.[288]

Article 17(1) provides for the rights of children to (i) care, assistance, and education; (ii) protection from violence and negligence; and (iii) special protection where they are "temporarily or definitively deprived of their family's support".[289] In terms of Article 17(1)(a), states are obligated to implement all appropriate measures to ensure the child's right to education. Article 17(2) enshrines the more comprehensive right to education, setting out that states must "provide children … a free primary and secondary education as well as to encourage regular attendance at school".[290] Because Article 17(2) is more specific, the ECSR examines alleged violations of the right to education under this provision. However, where the state involved only acceded to Article 17(1), claims will be examined thereunder.[291]

As a whole, Article 17 "requires states to establish and maintain an education system that is both accessible and effective".[292] In *Mental Disability Advocacy Centre (MDAC) v Bulgaria*[293],

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[286] ECSR "Conclusions 2017: Articles 3, 11, 12, 13, 14, 23 and 30 of the European Social Charter" (2018). See Conclusions on Azerbaijan, Belgium, Finland, Georgia, Italy, Montenegro, Romania, Russian Federation, Ukraine.
[287] Article 17 of the ESC(r).
[288] Complaint 98/2013 (20 January 2015) para 48; Complaint 69/2011 (23 October 2012) paras 31-21; *World Organisation against Torture (OMCT) v Ireland* Complaint 18/2003 (7 December 2004) para 55.
[289] Article 17(1) of the ESC(r).
[290] Article 17(1)-(2).
[291] Council of Europe "Digest of the case law of the European Committee of Social Rights" (2018) 170.
[292] Complaint 67/2011 (11 September 2012) para 129. See also, ECSR "Conclusions: Slovenia" (30 June 2006) 2003/def/SVN/17/1/EN; ECSR "Conclusions: Sweden" (30 June 2003) 2003/def/SWE/17/1/EN.
[293] Complaint 41/2007 (3 June 2008).

the ECSR explained that public education should comply with the 4-A scheme of the UN Special Rapporteur on the right to education.[294] As such, it is incorporated under Article 17.[295]

With regard to the availability of education, the ECSR has indicated that education should be functional. This means that there should be enough schools for children in rural and urban areas, a fair learner-teacher ratio, and that education should be "compulsory in general until the minimum age for employment".[296] In turn, an accessible education requires the cost of education to be reasonable, and that equal access to education be guaranteed.[297]

In *Médecins du Monde-International v France*[298], the ECSR referred to the importance of access to education for the development of the child, stating that the "denial of access to education will exacerbate" the position of children who belong to vulnerable groups.[299] States should, therefore, pay special attention to individuals who belong to vulnerable groups to ensure that they have equal access to education.[300] Equal access to education necessitates that all learners are empowered to benefit from the opportunities that the right provides, and requires that measures be implemented to discourage learners from dropping out.[301] To this end, education should also be acceptable and adaptable in the sense that all children should have access to the curriculum and educational institutions, with the circumstances being adapted to suit the needs of vulnerable groups.[302]

Related to the above, in its Conclusions on Slovenia the ECSR indicated that Article 11(2) places an obligation on states to ensure that health education be incorporated into the curriculum "throughout the entire period of schooling", with health education including sexual and reproductive education.[303] In its Conclusions on Albania, the ECSR further explained that sexual and reproductive education should be "objective, based on contemporary scientific evidence and does not involve censoring, withholding or intentionally misrepresenting

[294] Para 37.
[295] See the text to parts 4 2 4 1, 4 4 3, 4 5 3, 4 6 4 1.
[296] ECSR "Conclusions: Sweden" (30 June 2003) 2003/def/SWE/17/1/EN; ECSR "Conclusions: Slovenia" (30 June 2003) 2003/def/SVN/17/1/EN. See also, Council of Europe "Digest of the ECSR" 173.
[297] ECSR "Conclusions: Sweden" (30 June 2003) 2003/def/SWE/17/1/EN; ECSR "Conclusions: Slovenia" (30 June 2003) 2003/def/SVN/17/1/EN. See also, Council of Europe "Digest of the ECSR" 173.
[298] Collective Complaint 67/2011 (11 September 2012).
[299] Para 128.
[300] Complaint 114/2015 (24 January 2019) para 123. See also, Complaint 119/2015 (5 December 2017) para 86; ECSR "Conclusions: Turkey" (9 December 2011) 2011/def/TUR/17/2/EN; Collective Complaint 41/2007 (3 June 2008) para 34.
[301] ECSR "Conclusions: Sweden" (30 June 2003) 2003/def/SWE/17/1/EN; ECSR "Conclusions: Slovenia" (30 June 2006) 2003/def/SVN/17/1/EN. See also, Council of Europe "Digest of the ECSR" 173.
[302] Collective Complaint 41/2007 (3 June 2008) para 37.
[303] ECSR "Conclusions: Slovenia" (30 June 2003) 2003/def/SVN/11/2/EN.

information".[304] In these Conclusions, the ECSR referred to its judgment in *INTERIGHTS v Croatia*, decided under the ESC.[305] As a result, the argument presented is that the ECSR has incorporated that judgment in interpreting Article 11(2) of the ESC(r). Thus, Article 11(2) of the ESC and ESC(r) read with Article 17 requires that children receive "comprehensive or adequate sexual and reproductive education".[306] For sexual and reproductive education to be comprehensive and adequate, educational materials should not perpetuate discrimination or marginalisation against persons with non-heteronormative SOGIE.[307] Ultimately, sexual education should enable children to "make responsible decisions with regard to sexual and reproductive health behaviour".[308]

Article 7 of the ESC(r) is identical to Article 7 of the ESC. Although this provision does not contain a reference to an explicit right to education, this right can nonetheless be inferred. Article 7(3) provides that "persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education".[309] The reference to "persons *who are still* subject to compulsory education" [own emphasis] indicates that all persons, at some stage, will be subject to compulsory education. As such, there exists a right to education. Furthermore, the right clearly requires that provision is made for children to benefit fully from this right.[310] In this regard, the ECSR has, in numerous Conclusions, confirmed that the purpose of Article 7(3) is to "protect the right of every child to education by safeguarding their capacity to learn".[311]

Article 17(1)(b) contributes to safeguarding children's capacity to learn through providing that children should be protected "against negligence, violence or exploitation".[312] In *Association for the Protection of All Children (APPROACH) Ltd v Belgium*[313], the ECSR referred to its judgment of *OMCT v Portugal*, confirming that the meaning of violence under Article 17(1)(b) of the ESC(r) is the same as under Article 17 of the ESC.[314] The ECSR

[304] ECSR "Conclusions: Albania" (8 December 2012) 2017/def/ALB/11/2/EN.
[305] See the text to parts 5 4 2 and 5 4 3.
[306] Complaint 45/2007 (30 March 2009) para 13 and 45. See text to part 5 3 3.
[307] Paras 60-61. See the text to part 5 3 3.
[308] Complaint 45/2007 (30 March 2009) para 13 and 45. See text to part 5 3 3.
[309] Article 7(3) of the ESC(r).
[310] ECSR "Conclusions: Slovak Republic" (4 December 2015) 2015/def/SVK/7/3/EN; ECSR "Conclusions: Bosnia and Herzegovina (9 December 2011) 2011/def/BIH/7/3/EN.
[311] ECSR "Conclusions: Romania" (31 March 2002) 2002/def/ROU/7/3/EN. See also, ECSR "Conclusions: Serbia" (4 December 2015) 2015/def/SRB/7/3/EN; ECSR "Conclusions: Netherlands" (9 December 2011) 2011/def/NLD/7/3/EN.
[312] Article 17(1)(b) of the ESC(r).
[313] Complaint 98/2013 (20 January 2015).
[314] See the text to part 5 4 1. See also, Complaint 98/2013 (20 January 2015) para 50; Complaint 34/2006 (5 December 2006) para 19-21.

reiterated that states should implement national legislation that prohibits and penalises all forms of violence against children in schools and care settings, as well as at home.[315]

The ECSR's judgment in *DCI v Belgium* is significant for elucidating the interpretation of the right to education of children who form part of a vulnerable group. The applicant alleged that the Belgian government was in violation of the rights guaranteed to "unaccompanied foreign minors unlawfully present or seeking asylum and illegally resident accompanied minors" under Articles 7(10) and 17.[316] The ECSR explained that, as human rights instruments, the ESC(r) and the ECHR aim to give effect to the UDHR at a regional level. As such, the ESC(r) should "give life and meaning in Europe to the fundamental social rights of all human beings".[317] Therefore, in interpreting the ESC(r), the ECSR should adopt a teleological approach to give effect to this object and purpose.[318]

In *DCI v Belgium*, the ECSR also indicated that, because all the member states of the Council of Europe have ratified the CRC, the interpretation thereof must be taken into consideration when determining a violation of children's rights under the ESC(r).[319] As a result, the best interests principle informs the scope of the ESC(r) in respect of children.[320] In this regard, the ECSR reiterated General Comment 5 of the CRC Committee, explaining that:

> "Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions".[321]

In *DCI v Netherlands*, the ECSR confirmed the incorporation of the best interests principle under Article 17 of the ESC(r). Importantly, it referred to the use of the best interests principle as an "internationally recognised requirement" in all matters concerning children.[322] As discussed under the ESC and ECHR, as well as in relation to the treaties under discussion in chapter 4, the best interests principle is indeterminate. This comment also applies to the ESC(r). Therefore, the best interests of the child must guide the interpretation of the right to education

[315] Complaint 98/2013 (20 January 2015) para 51.
[316] Complaint 69/2011 (23 October 2012) para 1.
[317] Para 30.
[318] Para 30.
[319] Para 31.
[320] Para 32.
[321] CRC Committee "General Comment 5" paras 45-47.
[322] Complaint 47/2008 (20 October 2009) para 29.

of the child in a manner that ensures that all children have access to effective education, including that steps should be taken to guarantee this right to vulnerable groups.

5 6 Conclusion

This chapter illustrated that similar to the international human rights treaties discussed under chapter 4, human dignity forms the foundation of the European human rights system. Despite the absence of a reference to an explicit and general right to human dignity in the substantive provisions of the treaties discussed, as well as the lack of its inclusion as a value in their Preambles, the ECtHR and the ECSR has incorporated human dignity as the essence of the ECHR, ESC, and ESC(r) respectively. Under these instruments, human dignity is tied to the importance of respect for the physical and psychological integrity of persons.

The most significant contribution of this chapter is that it set out the ECtHR's unique approach to the protection of non-heteronormative SOGIE rights. Whereas the approach followed by the international treaty bodies focused on the right to equality and non-discrimination, the ECtHR developed non-heteronormative SOGIE rights by reading the right to privacy with the prohibition of discrimination. Article 8 has, therefore, been fundamental to establishing sexual orientation and gender identity as prohibited grounds of discrimination under Article 14. The reason for this lies in that both human dignity and privacy require the protection of aspects related to the individual's identity, including sexual orientation, gender identity and gender expression. However, the fact that non-heteronormative SOGIE rights are protected under the right to privacy does not mean that it is confined to the private sphere. Rather, it is protected under the right to privacy because sexual orientation, gender identity, and gender expression are intimate aspects of a person's life that should not be interfered with unless particularly serious reasons exist for doing so. In this regard, safeguarding moral interests, negative attitudes, and protecting traditional family values have not been deemed legitimate justifications for limiting the rights of persons with non-heteronormative SOGIE.

In light of the above, the jurisprudence on the protection of the rights of persons with non-heteronormative SOGIE illustrates that the ECtHR increasingly draws from queer theory and queer legal theory in developing the law, albeit implicitly. The ECtHR has also illustrated that it appreciates the violence of heteronormativity, seeking to interpret the rights and freedoms guaranteed under the ECHR in a manner that best promotes its object and purpose of protecting the human rights of all individuals. In this sense, the ECtHR also follows a teleological approach to interpretation.

Whereas the ECHR and the ESC(r) explicitly prohibits discrimination, the Preamble of the ESC simply refers to that social rights should be guaranteed without discrimination. Nonetheless, sexual orientation has been established as a prohibited ground of discrimination under both the ESC and the ESC(r). In this regard, the ECSR has drawn attention to the connection between discrimination and social exclusion, explaining that discrimination based on sexual orientation prevents individuals from fully enjoying the rights guaranteed under the ESC and the ESC(r). To date, the ECSR has not referred to non-heteronormative gender identities or gender expressions as prohibited grounds of discrimination. However, the ECSR's Conclusions allude to the potential for future interpretation of "gender" or "other status" as including non-heteronormative gender identities, as increasing concern has been expressed over discrimination against this group.

This chapter also outlined the current interpretation of the right to education under the ECHR, the ESC, and the ESC(r). Whereas education is an explicit right under the ECHR and the ESC(r), it is an implied right under the ESC. Although the formulation of the right is different under these instruments, its interpretation has been similar. Drawing from the UDHR, ICESCR, and the CRC, the ECtHR and the ESCR has explained that all children have the right to an equal and effective education that promotes democratic values. To this end, all children should be empowered to benefit from the opportunities that the right to education provides. This includes that the curriculum is focused on the development of the child, together with imparting relevant knowledge.

Because the best interests principle is not a separate right under the ECHR, the ECR, or the ESC(r), it was discussed in the context of the right to education. It was found that the best interests principle also applies in the context of education. In this regard, it was explained that reading the right to education with the best interests principle requires that children be given comprehensive and diverse sexual and reproductive education to ensure that they can make responsible decisions regarding intimate aspects of their private life. Moreover, children should be taught democratic values to cultivate respect for all members of their communities. Finally, the best interests principle also prohibits discrimination against children in their access to education, as this goes against development as a fundamental aspect of education.

This chapter established that reading Article 14 of the ECHR with Article 2 of Protocol 1 prohibits discrimination against children with non-heteronormative SOGIE in the context of education. Under the ESC and ESC(r), discrimination based on sexual orientation is prohibited in the application of the rights contained therein. As a result, it is also prohibited in ensuring the right to education.

Against the backdrop of chapters 4 and 5, chapter 6 sets out the right to education of children with non-heteronormative SOGIE under the ADRDM, the ACHPR, the Protocol of San Salvador, and the Convention of Belém do Pará.

6 The right to education of children with non-heteronormative SOGIE under regional inter-American human rights law

6 1 Introduction

The jurisprudence of the IACtHR illustrates the strongest support for the rights of persons with non-heteronormative SOGIE under international or regional human rights law. The reason for this is its recent jurisprudence in this regard, drawing from decades of developments under the international and regional human rights systems. As such, it presents the most up to date interpretation of the rights of persons with non-heteronormative SOGIE under international law, thereby establishing the current discourse surrounding human rights developments in this sphere.

This chapter focuses on the ADRDM and the ACHPR. This is followed by a brief discussion on the Protocol of San Salvador and the Convention of Belém do Pará. The analysis departs from the assumption that the ADRDM and ACHR provide equal rights to all persons, including those with non-heteronormative SOGIE. It is argued that, as a result, these instruments also require the special protection of persons with non-heteronormative SOGIE. The further assumption is that children are entitled to the same rights but are also offered additional protection as a result of their status as minors. Based on the broad formulation of the relevant rights and its interpretation by the inter-American Commission of Human Rights ("IACmHR") and IACtHR, it is argued that the ADRDM and the ACHR protect the right to education of children with non-heteronormative SOGIE.

The discussion reveals the unique approach of the IACmHR and the IACtHR in developing the rights of persons with non-heteronormative SOGIE in comparison to the international and European systems.[1] Similar to the international and European systems, the inter-American system also inadvertently relies on queer theory to question what is perceived as acceptable behaviour and modes of being. Importantly, this chapter shows that the IACtHR has gone much further than its international and European counterparts, drawing extensively from the YP.[2]

[1] See the text to part 3 5 for the importance and value of comparative legal research for the development of human rights law in general.

[2] See the text to parts 4 7, 5 3 2 and 5 4 2. See also, Inter-American Convention against All Forms of Discrimination and Intolerance (adopted 5 June 2013, entered into force 20 February 2020). The Inter-American Convention against All Forms of Discrimination and Intolerance presents a novel approach to non-discrimination under the inter-American system as it not only sets forth a definition of discrimination, but also explicitly lists sexual orientation and gender identity as prohibited grounds of discrimination. However, because it only recently entered into force, there has been no interpretation of its provisions. Thus, no further analysis is possible. Nonetheless, this convention frames the inter-American system in which it was conceived and has potential for contributing towards further developing the rights of persons with non-heteronormative SOGIE in the region.

6 2 Overview of the inter-American human rights system

6 2 1 Organisation of American States

Having its roots in 1890, the Organisation of American States ("OAS") is the oldest regional human rights organisation in the world.[3] Ratification of the OAS Charter is a prerequisite for membership of the OAS.[4] The OAS Charter provides for the existence of the OAS General Assembly, comprised of representatives of all OAS Member States.[5] The General Assembly is authorised to adopt declarations and resolutions at their regular and special sessions that are aimed at promoting the mandate of the OAS Charter.[6] Although the OAS Charter sets the mandate of the OAS, it cannot be invoked to bring inter-state, individual, or collective complaints. As such, the OAS provided for the creation of the IACmHR in the OAS Charter to "promote the observance and protection of human rights" and envisaged the adoption of an inter-American convention on human rights.[7]

6 2 2 Two main human rights instruments and the role of the IACmHR and IACtHR

6 2 2 1 American Declaration on the Rights and Duties of Man

The ADRDM was adopted at the same time as the OAS Charter, making it the first international human rights instrument.[8] The ADRDM is founded on the recognition that all persons are equal in dignity and rights, and that essential rights derive from the inherent dignity of the individual.[9] As a result, the principal aim of states should be to provide for the progressive protection of these rights, to create an environment that enables individuals to "achieve spiritual and material progress and attain happiness".

The IACtHR's advisory opinion on the *Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention of Human Rights* is significant for expounding the status of the ADRDM.[10] The Republic of

[3] B Ghidirmic "The American Declaration of the Rights and Duties of Man: An underrated gem of international human rights law" (2018) 4 *JL & Pub Admin* 50, 52-53. See also, C Medina Quiroga "The Inter-American System for the Protection of Human Rights" in C Krause & M Schenin (eds) *International Protection of Human Rights: A Textbook* (2012) 519 519-520.
[4] Article 4. See also, OAS "Member States" (2020) *OAS* <http://www.oas.org/en/member_states/default.asp> (accessed 02-06-2020): All 35 independent countries of the Americas are OAS members.
[5] Articles 54 and 56.
[6] Articles 57-59.
[7] Articles 106 and 145.
[8] The ADRDM was adopted on 2 May 1948, and the UDHR on 10 December 1948.
[9] The foundation of the treaties discussed under chapters 4 and 5 are the same.
[10] Advisory Opinion OC-10/89, IACtHR Series A No 10 (14 July 1989).

Colombia posed the question of whether Article 64 of the ACHR includes the ADRDM.[11] Article 64 authorises the IACtHR to interpret the ACHR or "other treaties concerning the protection of human rights in the American states". According to the IACtHR, the point of departure is that the ADRDM, as an international instrument, should be interpreted and applied with consideration of its overall framework at the time of interpretation, as well as its evolution since its adoption.[12] This alludes to the application of a teleological approach.[13]

Although the ADRDM does not qualify as a treaty in terms of the Vienna Convention, the IACtHR explained that Article 64 of the ACHR empowers it to interpret the ADRDM.[14] Its argument was based on that the ACHR explicitly refers to the principles elucidated in the ADRDM in its Preamble, and also provides in Article 29(d) that none of its provisions may be interpreted as "excluding or limiting the effect of the [ADRDM]".[15]

When interpreting the OAS Charter, its norms have to be connected to corresponding provisions under the ADRDM.[16] This argument is supported by Article 1 of the Statute of the IACmHR, where it is provided that the ADRDM applies to the Member States of the OAS who have not ratified the ACHR.[17] Although the ADRDM cannot be used in direct petitions where states have ratified the ACHR, it may still be referred to for interpretive guidance.[18]

6 2 2 2 American Convention on Human Rights

Like the treaties discussed under chapters 4 and 5, the Preamble to the ACHR reaffirms that the essential rights of man derive from their inherent human attributes. The object and purpose of the ACHR is therefore to provide an environment that allows all persons to exercise their rights and to offer protection against interference therewith. The Preamble further confirms

[11] Paras 1-2.
[12] Para 37.
[13] See the text to part 3 6 2.
[14] Paras 33-35.
[15] Para 36.
[16] Para 43.
[17] Paras 41-42 and 45-46. See also, Statute of the inter-American Commission on Human Rights (entered into force 1 November 1979).
[18] Para 47. See C Cerna "Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man" (2009) 30 *U Pa J Int'l Econ L* 1211-1238, in particular, 1233-1237, where this approach is criticised. Cerna argues that although the ADRDM should be applied to states who are have not ratified the ACHR, it should not be considered in respect of violations that occurred prior to their accession to the ACHR. With reference to *Lopez Aurelli v Argentina*, IACmHR Report No 74/90 (22 February 1991), where the state was found in violation of both the ADRDM and the ACHR, Cerna explains that the IACmHR is not "mandated to consider violations of the [ADRDM] and the [ACHR] in the same case". Determining a violation under these respective instruments sets in motion two different procedures. Similarly, the IACtHR may only interpret, apply, and render legally binding judgements in respect of the ACHR, and not the ADRDM.

that the principles enshrined therein have been outlined in the OAS Charter, ADRDM, UDHR, and in other international and regional instruments.[19]

The ACHR has both a substantive and institutional facet. Its substantive facet is concerned with the enumeration of rights, whereas its institutional facet concerns the establishment of the IACmHR and the IACtHR.[20] States who have ratified the ACHR undertake to respect the rights and freedoms of all persons within their jurisdiction without discrimination.[21] The civil and political rights protected under the ACHR are similar to the ADRDM. However, unlike the ADRDM, the ACHR does not enshrine specific economic, social, and cultural rights. Rather, Article 26 contains a single overarching obligation on states to ensure the progressive realisation of economic, social, and cultural rights. In relation to this, Article 77, read with Article 33, provides for the adoption of Protocols to supplement the rights and obligations contained in the ACHR. To date, two additional protocols have been adopted. The Protocol of San Salvador is relevant in this regard for its comprehensive protection of economic, social, and cultural rights.[22]

Like the treaties discussed under chapters 4 and 5, the ACHR should also be interpreted in terms of the Vienna Convention. Because the ACHR provides a legal framework under which states commit to protect the basic rights of individual human beings, the interpretation that best fulfils this purpose should be adopted.[23] To this end, the IACtHR often draws from other human rights treaties in its interpretation of the ACHR, in particular, the CRC and the ECHR. It has justified this, stating that the broader international framework that treaties form part of, should be considered to ensure that the ACHR adapts to evolving human rights norms.[24] Within the scope of this research, the Protocol of San Salvador and the CRC are of particular value for providing interpretative guidance in the interpretation of the prohibition on discrimination, the

[19] Preamble to the ACHR. See also, Quiroga "Inter-American System" in *International Protection of Human Rights* 525.
[20] T Farer "The Rise of the Inter-American Human Rights Regime: No longer a unicorn, not yet an ox" in DJ Harris & S Livingstone (eds) *Inter-American System of Human Rights* (1998) 31 41.
[21] Article 1 of the ACHR.
[22] See the text to part 6 5 1.
[23] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC-02/82, IACtHR Series A No 02 (24 September 1982) para 33. See also, D J Harris "Regional Protection of Human Rights: The Inter-American achievement" in D J Harris & S Livingstone (eds) *Inter-American System of Human Rights* (1998) 1 9-10.
[24] *Bueno Alves v Argentina* (Merits, Reparations, and Costs) IACtHR Series C No 164 (11 May 2007) para 76; *Ituango Massacres v Colombia* (Preliminary Objections, Merits, Reparations, Costs) IACtHR Series C No 148 (1 July 2006) para 156. See also, TM Antkowiak & A Gonza *The American Convention on Human Rights: Essential Rights* (2017) 109.

right to equal protection of the law, the right of the child to special protection, and the right to education.[25]

6 2 2 3 Inter-American Commission and inter-American Court

The OAS has two main organs, the IACmHR and the IACtHR. Whereas the IACmHR has jurisdiction in respect of parties to both the ADRDM and the ACHR, the IACtHR's jurisdiction is limited to the ACHR. The IACmHR is tasked with promoting the observance and protection of human rights in all OAS Member States.[26] Melish explains that the promotional mandate of the IACmHR enables it to address dimensions of human rights abuse that does not constitute admissible claims through its contentious mandate.[27]

The IACmHR's contentious mandate differs depending on whether a complaint is based on the ADRDM or the ACHR. Concerning Member States to the ADRDM, the IACmHR is empowered to examine communications submitted to it and make recommendations on the effective observance of fundamental human rights.[28] Because 24 of the 35 OAS Member States have ratified the ACHR, claims brought under the ADRDM are scarce. As a result, additional interpretive guidance has to be drawn from the Annual Reports of the IACmHR, as well as the work of OAS Special Rapporteurs. In respect of Member States to the ACHR, the IACmHR can consider petitions from individuals, groups or non-governmental organisations, alleging violations of the ACHR, as well as inter-state complaints of the same nature.[29]

The IACtHR was established in 1979 as "an autonomous judicial institution" of the OAS and has jurisdiction over states who have ratified the ACHR. Its purpose is the interpretation and application of the ACHR, distinguishable from the IACmHR.[30] The IACtHR has both advisory and adjudicatory (contentious) jurisdiction.[31] With regard to its advisory jurisdiction, OAS Member States may request advisory opinions from the IACtHR on the interpretation of the ACHR or other human rights treaties applicable to American states, as well as on whether

[25] Articles 1(1), 19, 24, and 26 of the ACHR.
[26] Article 1 of the Statute of the IACmHR.
[27] TJ Melish "The Inter-American Commission on Human Rights: Defending social rights through case-based petitions" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 339 339.
[28] Article 20 of the Statute of the IACmHR.
[29] Articles 19-20 of the Statute of the IACmHR; Articles 44-47 of the ACHR. Complaints will be admissible where it concerns an alleged violation of a right guaranteed in either the ADRDM or the ACHR, where domestic remedies have been exhausted, where the matter is not pending in another international proceeding, and where it is not similar in substance to a prior complaint considered by the IACmHR.
[30] Article 1 of the Statute of the inter-American Court of Human Rights (adopted 1 October 1979, entered into force 1 January 1980).
[31] Article 2.

its domestic law is compatible therewith.[32] Thus, it is not just states who have ratified the ACHR who may request advisory opinions. In terms of its contentious jurisdiction, the IACtHR is authorised to adjudicate complaints of violations of the ACHR. Complaints may be submitted by the IACmHR, or by a member State of the ACHR, provided that the state made a special declaration or concluded a special agreement to this effect.[33] Even where the IACmHR does not submit a complaint, it is still required to appear in all cases before the IACtHR.[34] Complaints will be admissible where it satisfies the same requirements as those in relation to the contentious jurisdiction of the IACmHR.[35]

6 3 American Declaration on the Rights and Duties of Man

6 3 1 Human dignity as an underlying vale

There are four references to dignity in the ADRDM, two of which are relevant to this discussion. The first is contained in a section that precedes the Preamble, where it is recognised that "[t]he American peoples have acknowledged the dignity of the individual". In the Preamble, it is explained that all persons are "born free and equal, in dignity and rights". Through these statements, State Parties acknowledge that dignity is an inherent human attribute, requiring that all persons be treated with respect and concern.[36]

In its Annual Report for 1980-1981, the IACmHR referred to the overarching aim of the OAS to protect human rights, reiterating the obligation on states to guarantee respect for the right to life and human dignity.[37] It has also incorporated the right to a dignified life under Article I, which provides for the right to life, liberty, and security. In this regard, the IACmHR's Annual Report of 1993 is relevant for considering the effective use and allocation of resources to determine "whether adequate measures have been taken to implement and secure economic, social and cultural rights". The IACmHR explained that "a certain minimum level of material

[32] Article 64 of the ACHR. See also, Articles 59-64 of the Rules of Procedure of the inter-American Court of Human Rights (entered into force 1 January 1997).
[33] Articles 61-62 of the ACHR.
[34] Article 57.
[35] Article 61(2).
[36] See the text to parts 3 4 1, 4 2 2, 4 3 1, 4 4 1, 4 5 1, 4 6 1, 4 7, 5 3 1, 5 4 1, and 5 5 1. From these discussions, it is clear that the right to human dignity has become universal.
[37] OAS "Annual Report of the inter-American Commission on Human Rights: 1980-1981" (16 October 1981) OEA/Ser.L/V/II.54 Doc. 9 rev. 1 Chapter II. See also, *Jose Isabel Salas Galindo and Others v United States* (Merits) IACmHR Report No 121/18 (5 October 2018) para 322.

well-being" is required to guarantee the "rights to personal security, dignity, equality of opportunity and freedom from discrimination".[38] Member states are, therefore, obligated to:

> "[I]mplement positive measures aimed at guaranteeing dignified living conditions, equal opportunities, and full participation in decision-making as basic objectives of the integral development of the inhabitants and societies of the Hemisphere".[39]

Together with the indication that a dignified life requires a certain level of well-being, the IACmHR has explained that the right to a dignified life necessitates the prohibition of corporal punishment and other forms of degrading treatment because it infringes on the right to respect for "physical, mental, and moral integrity".[40]

When considering children's right to a dignified life, the joint concurring opinion of Cançado Trindade and Abreu-Burelli JJ in the *Case of "Street Children" (Villagran-Morales et al) v Guatemala* ("*Street Children*") is significant.[41] Although the matter was decided under the ACHR, Cançado Trindade and Abreu-Burelli JJ referred to the ADRDM in interpreting the right to life. According to them, protecting vulnerable groups, such as children, demands an interpretation of this right that considers the minimum conditions required for a life with dignity.[42] Significantly, they explained that this includes the right to pursue a life project, which "encompasses fully the ideal of the [ADRDM] of proclaiming the spiritual development as the supreme end and the highest expression of human existence".[43]

Human dignity has also been mentioned in relation to Article XVII, which guarantees the right to judicial personality. According to the IACmHR in the *Undocumented Workers v United States of America,* this right stems from the "sole condition of being human".[44] The state's failure to recognise a person implicates their enjoyment of various other rights, violating their inherent human dignity.[45]

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[38] OAS "Annual Report of the inter-American Commission on Human Rights: 1993" (11 February 1994) OEA/Ser.L/V.85 Doc. 9. rev. Chapter V.
[39] OAS "Annual Report of the inter-American Commission on Human Rights: 2000" (16 April 2001) OEA/ Ser./L/II.111 doc. 20 rev. para x. Reiterated in: IACmHR "Annual Report of the inter-American Commission on Human Rights: 2011" (30 December 2011) OEA/Ser.L/V/II. Doc. 69 para 15. See also, OAS "Promotion and Protection of Human Rights" (5 June 2018) AG/RES. 2928 (XLVIII-O/18) para vii.
[40] *Prince Pinder v Commonwealth of the Bahamas* (Merits) IACmHR Report No 79/07 (15 October 2007) para 26. See also, *Franz Britton v Guyana* (Merits) IACmHR Report No 01/06 (28 February 2006) para 25.
[41] (Merits) IACtHR Series C No 63 (19 November 1999).
[42] (Joint concurring opinion of Judges Cançado Trindade and Abreu-Burelli) para 7.
[43] Para 8.
[44] (Merits) IACmHR Report No 50/16 (30 November 2016) para 94.
[45] Para 94.

Considering the above, it is clear that human dignity is one of the foundational values of the ADRDM, underlying each of the substantive rights enshrined therein. It requires states to ensure conditions for a dignified life, implicating minimum standards of rights, including the right to education, and the right to not be discriminated against in the enjoyment of rights. Based on this interpretation and the state's obligation to provide an environment conducive to the well-being and development of all persons, the right to a dignified life has potential to ensure the right to education of children without discrimination based on their non-heteronormative SOGIE.

6 3 2 Non-discrimination

The idea that all persons are equal underlies the ADRDM and is enshrined in Article II, which provides that:

> "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor".

This provision establishes both the right to non-discrimination and equal protection of the law, prohibiting all forms of discrimination based on the listed grounds or "any other factor". As a point of departure, the IACmHR has explained that the right to equality and non-discrimination derives from human dignity and underlies all other rights guaranteed under the ADRDM.[46]

Article II requires that all persons be treated equally in law and in fact, placing an obligation on states to adopt legislation and public policies aimed at ensuring this, as well as adapting existing ones.[47] Considering the wording of Article II, it is clear that distinguishing between persons based on them belonging to a particular group constitutes discrimination. However, differential treatment does not constitute discrimination if it pursues an aim deemed legitimate in democratic societies, with the means being reasonable and proportionate to the aim sought to be achieved.[48]

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[46] *Jeffrey Timothy Landrigan v United States of America* (Merits) IACmHR Report No 81/11 (21 July 2011) para 47; *Mayan Indigenous Community of the Toledo District v Belize* (Merits) IACmHR Report No 40/04 (12 October 2004) para 163. See also, *Rafael Ferrer-Mazorro et al v United States of America* (Merits) IACmHR Report No 51/01 (4 April 2001) para 238.

[47] *Jessica Lenahan (Gonzales) et al v United States of America* (Merits) IACmHR Report No 80/11 (21 July 2011) para 109.

[48] *Undocumented Workers v United States of America* (Merits) IACmHR Report No 50/16 (30 November 2016) para 74; *Manickavasagam Suresh v Canada* (Merits) IACmHR Report No 08/16 (13 April 2016) para 87.

Compared to the international and regional human rights instruments discussed under chapters 4 and 5, Article II provides a limited list of prohibited grounds of discrimination. However, like the other treaties discussed, it too contains an open-ended reference to discrimination based on "any other factor".[49] According to the IACmHR in *Oscar Elías Biscet et al v Cuba*,[50] this means that any other form of discrimination is prohibited.[51]

Although there has been no express confirmation that non-heteronormative SOGIE are prohibited grounds of discrimination under Article II, the argument presented is that these are protected categories. This argument is supported by four related points. First, that in the interpretation of provisions of the ADRDM, recourse must be had to the development of international law as reflected in human rights instruments and through customs. In this regard, the ACHR is of particular relevance as "an authoritative expression of the fundamental principles set forth in the [ADRDM]".[52] Second, that the OAS General Assembly has adopted numerous resolutions expressing concern over the human rights violations perpetrated against persons based on their non-heteronormative SOGIE, explaining its impact on numerous other rights, as well as recommending that steps be taken to address this. Third, that Articles V (protection from attacks on their private and family life) and XVII (recognition of juridical personality and civil rights) of the ADRDM support the prohibition of discrimination based on non-heteronormative SOGIE. Finally, that the underlying value of human dignity which requires states to ensure the well-being of all persons warrants this approach.

With regard to the first point, the discussion under 6 4 on the ACHR's prohibition of discrimination based on non-heteronormative SOGIE is relevant. If the ACHR is deemed authoritative on the fundamental rights enshrined in the ADRDM, the IACtHR's proclamations pertaining to Articles 1(1) and 24 of the ACHR is arguably applicable to Article II of the ADRDM. Moreover, the IACtHR has drawn extensively from international law to establish non-heteronormative SOGIE as prohibited grounds of discrimination.

Concerning the second point, it is important to note that OAS General Assembly adopted its first resolution on human rights, sexual orientation, and gender identity in 2008. In this resolution, it expressed concern over the human rights violations committed against persons based on their sexual orientation and gender identity.[53] This was followed by the establishment of a Unit on the Rights of Lesbian, Gay, Bisexual, and Intersex Persons in 2011, and the

[49] See the text to parts 4 2 3, 4 3 2, 4 4 2, 4 5 2, 4 6 3, 5 3 2 and 5 5 2.
[50] (Merits) IACmHR Report No 67/06 (21 October 2006).
[51] Para 229.
[52] (Merits) IACmHR Report No 40/04 (12 October 2004) paras 86-88.
[53] OAS "Human rights, sexual orientation, and gender identity" AG/Res.2435 (XXXVIII-O/08) (3 June 2008).

subsequent creation of a Rapporteurship on the Rights of Lesbian, Gay, Bisexual, Trans, and Intersex Persons ("LGBTI Rapporteurship") in 2014.[54]

In the Annual Reports of the IACmHR, which includes the activities of the LGBTI Rapporteurship, there have been numerous expressions of concern and condemnation over the human rights violations that persons with non-heteronormative SOGIE suffer in both the public and private spheres.[55] Specific examples include the continuing criminalisation of same-sex sexual conduct, the lack of anti-discrimination legislation, and how this prevents persons with non-heteronormative SOGIE from the equal enjoyment of numerous rights.[56]

In contrast, the IACmHR has also expressed its approval of increasing recognition of non-heteronormative marriages and partnerships, as well as of simple administrative procedures for the rectification of sex markers on personal documents.[57] The efforts of various states in the United States of America have been praised, including the prohibition of conversion therapy, the utilisation of "x" as a gender marker for persons with non-heteronormative gender identities, allowing persons to use public restrooms that correspond to their gender identity, and including lessons on the history of non-heteronormative SOGIE in the school curriculum.[58]

Considering these statements in light of the obligation imposed by Article II, states have to address "deep-seated practices of discrimination, prejudice and negative stereotypes" based on non-heteronormative SOGIE, whether real or perceived, through legislation and education.[59] As a result, non-heteronormative SOGIE has been included under "any other factor" as a prohibited ground of discrimination.

Unlike under the ACHR, the IACmHR is yet to determine a violation of the rights of a person with non-heteronormative SOGIE under the ADRDM. However, in 2016, the IACmHR rendered admissible its first case pertaining to discrimination based on gender identity. In

[54] OAS "Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons" (2020) *OAS* <https://www.oas.org/en/iachr/lgtbi/> (accessed 29-05-2020); IACmHR "IACHR Created Unit on the Rights of Lesbian, Gay, Bisexual, Trans, and Intersex Persons" (03-11-2011) *OAS* <https://www.oas.org/en/iachr/media_center/PReleases/2011/115.asp> (accessed 29-05-2020). The work of the LGBTI Rapporteurship is responsible for monitoring the human rights situation of persons with non-heteronormative SOGIE in OAS member states and have published reports in this regard.

[55] OAS "Annual Report of the inter-American Commission on Human Rights: 2014" (7 May 2015) Chapter IV, para 36.

[56] OAS "Annual Report of the inter-American Commission on Human Rights: 2019" (6 April 2020) Chapter VI, paras 24, 543 and 550; IACmHR "Annual Report of the inter-American Commission on Human Rights: 2018" (21 March 2019) Chapter VI, paras 18, 393 and 401.

[57] OAS "Annual Report of the inter-American Commission on Human Rights: 2015" (17 March 2016) Introduction, paras 15-16.

[58] OAS "Annual Report: 2019" Chapter IV, para 309.

[59] OAS "Annual Report of the inter-American Commission on Human Rights: 2016" (27 April 2017) Chapter III, para 125.

Tamara Mariana Adrián Hernández v Venezuela[60], it was argued that the state violated various rights enshrined under the ADRDM and the ACHR, including Article II of the ADRDM because it prohibited an amendment of the identification details of the petitioner to correspond to their gender identity.[61] Although the IACmHR did not consider the merits of the matter, it nonetheless drew attention to the obligation on states to ensure the rights of persons with non-heteronormative gender identities, providing quick and simple processes to change their names and sex or gender markers on their identification documents and records.[62]

Considering the third point, the IACmHR's statements in relation to the recognition of the rights of persons with non-heteronormative SOGIE indicates that the right of all persons to protection from attacks on their private and family life, as well as the right to legal recognition supports an interpretation of Article II that prohibits discrimination based on these grounds. This is based on the interpretation of similar rights contained in Articles 3 and 11(2) the ACHR respectively, expanded on under 6 4.

Finally, because human rights derive from the inherent dignity of the individual, all persons are entitled to respect for their rights.[63] Human dignity is connected to the right to equal protection and to not be discriminated against based on belonging to a particular group. Ultimately, discrimination prevents the recognition of the inherent dignity of all persons, disabling them from enjoying the essential rights due to them, including the right to education.

6 3 3 Education

Article VII of the ADRDM guarantees the right of the child to special protection, care, and aid.[64] This provides supplementary protection to children that complements their other rights.[65] Tied to this is the duty imposed on every person to protect their children, with a corresponding duty on children to honour their parents.[66] These provisions require that children be given "assistance and care due to their status as minors" and imposes an obligation on states to adopt

[60] (Admissible) IACmHR Report 66/16 (6 December 2016).
[61] Para 2.
[62] Para 27.
[63] See the text to part 6 3 1.
[64] See the text to parts 4 3 2 3, 4 4 3 4, 4 6 2, 5 4 1 and 5 5 3. The international treaties that provide explicit protection to children's rights are the ICCPR, ICESCR, and the CRC. Under the European system, it is the ESC and ESC(r). Although the formulation of the provisions that offer special protection to children differ, the core remains the same. Parents or guardians, society, and the state are obligated to protect children because their status as children make them vulnerable.
[65] OAS "Towards the effective fulfilment of children's rights" (30 November 2017) OEA/Ser.L/V/II.166 Doc. 206/17 para 43
[66] Article XXX of the ADRDM.

measures aimed at ensuring their full development, as well as their right to a decent life.[67] In this regard, the Rapporteur on the Rights of the Child has drawn attention to the importance of creating conditions favourable to the holistic development of children, including the implementation of policies and programmes that address the "structural causes at the origin of situations of violations of human rights and violence against children".[68]

In its interpretation of children's rights under the ADRDM, the IACmHR draws from the CRC and the ACHR as the *corpus iurus* on children's rights under inter-American human rights law.[69] The IACmHR has utilised the CRC to incorporate the definition of a child as a person below the age of 18 into the ADRDM. In the same way, it has incorporated children's right to non-discrimination, to participate in decision-making on matters that affect their lives, the right to life, survival, and development, and to have their best interests taken into consideration in all matters concerning them.[70] The IACmHR, in its 1997 Annual Report, confirmed that all decisions that affect the rights of the child must be made with due consideration of their best interests.[71] As a right that complements all other children's rights, Article VII underlies the right to education, enshrined in Article XII.

Article XII enshrines a comprehensive right to education. First, it provides that all persons have a right to education, which must be free at primary level. Second, education "should be based on the principles of liberty, morality, and human solidarity". Third, it should enable people to live a dignified life and to participate in their communities, contributing to its improvement. Finally, the right to education includes the right to equal educational opportunities. Unique to the ADRDM is that Article XXXI imposes an explicit obligation on persons to "acquire at least an elementary [also known as primary] education". The right to education under the ADRDM therefore extends much further than guaranteeing access to education.

As regards the general right to education provided for under Article XII, the Special Rapporteur on Economic, Social, Cultural, and Environmental Rights ("SRESCER") has

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[67] OAS "The rights of the child in the inter-American human rights system" (29 October 2008) OEA/Ser.L/V/II.133 doc. 34 para 20. See also, OAS "Children and adolescents in the United States' adult criminal justice system" (1 March 2018) OAS/Ser.L/V/II. 167 Doc. 34 paras 19 and 278.

[68] OAS "Annual Report of the inter-American Commission on Human Rights: 2017" (22 March 2018) Chapter IV para 106.

[69] OAS "Children and adolescents in the US" para 18. See also, IACmHR "Juvenile justice and human rights in the Americas" (13 July 2011) OEA/Ser.L/V/II. Doc. 78 para 15.

[70] OAS "The rights of the child" paras 31-32; IACmHR "Children and adolescents in the US" para 20. See the text to part 4 6.

[71] OAS "Annual Report of the inter-American Commission on Human Rights: 1997" (13 April 1998) OEA/Ser.L/V/II.98 doc. 6 rev. Chapter VII, para 5.

explained that education is an "intrinsic human right and an indispensable means of realizing other rights".[72] Through its concern expressed over inadequate school infrastructure, it can be deduced that the right to education includes the right to an accessible and secure educational environment.[73] Furthermore, the approval articulated over the implementation of policies aimed at improving the quality of education indicates that this too is included under the right.[74]

The requirement that education "be based on the principles of liberty, morality, and human solidarity" speaks to the content of the curriculum and the atmosphere at schools. In its 2017 Annual Report, the IACmHR underscored the "right of children to receive an education free from stereotypes based on ideas of inferiority and subordination".[75] The argument presented is that this requires that educational materials cover diverse SOGIE when addressing topics such as sexual and reproductive health, presenting it in a manner that normalises diverse SOGIE. This argument is supported by the concern expressed by the SRESCER over the violence and discrimination perpetrated against children with non-heteronormative SOGIE in schools by administrative staff, teachers, as well as other learners. As a result, it has instructed states to implement all necessary measure to combat this and to ensure the rights of persons with non-heteronormative SOGIE within their jurisdictions.[76]

Related to the above is the right to equal educational opportunities. Through this reference, Article XII integrates the right of equal protection of the law and the prohibition of discrimination, provided for under Article II, into the right to education.[77] The right to equal educational opportunities not only necessitates that children be afforded equal access to educational institutions but also means that they should be enabled to derive equal benefit from education. Thus, in providing for the right to education, states must ensure that all children can enjoy this right without discrimination of any kind, including based on their non-heteronormative SOGIE.

Considering non-discrimination based on religion and not non-heteronormative SOGIE, the IACmHR's decision in *Jehovah's Witnesses v Argentina* supports this point.[78] It concerned a challenge to decree 1867 that entered into force in 1976, prohibiting all the activities of

[72] OAS "Annual Report of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights: 2019" (24 February 2020) OEA/Ser.L/V/II. Doc. 5 para 665.
[73] Para 94
[74] Para 551.
[75] OAS "Anuual Report: 2017" Chapter IV, para 152.
[76] OAS "Annual Report of SRESCER: 2019" para 359.
[77] See the text to part 6 3 2.
[78] (Merits) IACmHR Case No 2137 (18 November 1978).

Jehovah's Witnesses.[79] According to the decree, the denomination "maintains principles that are contrary to the national character, to the basic institutions of the state and to the fundamental principles of this legislation".[80] However, the state did not explain how the activities of Jehovah's Witnesses violated these principles. Of relevance is that children of this faith were also prohibited from being assessed at school. This prevented them from accessing equal educational opportunities because examinations determine whether learners pass a grade, moving on to the next one until they have completed their schooling.[81] As a result, the IACmHR found violations of the right to equal protection of the law and of children's right to education without discrimination.[82]

Article XII furthermore incorporates the right to a dignified life, envisaged under the Preamble and Article I, through requiring education to promote children's right to a dignified life and enable them to uplift their communities. [83] This goal can only be achieved if children are accorded the special care due to them as minors, focusing on their full development in a secure environment, and considering their best interests in all matters concerning them. It is therefore imperative that states adopt legislation and implement measures to this end, including the prohibition of corporal punishment in schools and at home.[84]

6 4 American Convention on Human Rights

6 4 1 A unique right to human dignity

Article 5 enshrines the right to humane treatment, stating that:

> "1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person".

Article 5 is similar to Article 3 of the ECHR.[85] However, what makes it unique is its recognition of a broad and autonomous right to respect for human dignity.[86] Because Article 5(1) enshrines

[79] Para 1.
[80] Para 1.
[81] Para 9.
[82] Whereas, para 4; Resolves, para 1.
[83] See the text to part 6 4 1.
[84] OAS "Annual Report of SRESCER: 2019" para 69; OAS "Report on Corporal Punishment and Human Rights of Children and Adolescents" (5 August 2009) OEA/Ser.L/V/II.135 Doc. 14 para 113.
[85] See the text to part 5 3 1.
[86] Antkowiak & Gonza *Essential Rights* 103.

an autonomous right, it means that conduct can constitute a violation thereof without meeting the thresholds for torture or cruel, inhuman, or degrading punishment or treatment under Article 5(2). Article 27 further lists Article 5 as non-derogable, meaning that there are no circumstances under which State Parties can suspend the right to humane treatment.[87] The decisions discussed below illustrate the broad application of Article 5(1), drawing attention to how the right to human dignity informs all other rights enshrined in the ACHR and is accorded to all persons equally, including children and persons with non-heteronormative SOGIE.

Velasquez Rodriguez v Honduras concerned the violation of Article 5 as a result of the State's mistreatment of the victim under detention.[88] The IACtHR explained that the right to humane treatment and to have one's life respected emanate from the inherent human dignity of all individuals. Violations of these rights therefore indicate a "crass abandonment" of the values that underlie the inter-American system.[89] Furthermore, because human rights derive from human dignity, it is superior to the power of the state, which undertakes to respect the rights and freedoms contained in the ACHR. As such, the rights to humane treatment and to have one's life respected "require States Parties to take reasonable steps to prevent situations which are truly harmful to the rights protected".[90]

Against this backdrop, it is also significant that the IACtHR in *Winston Caesar v Trinidad and Tobago* held that the right to humane treatment prohibits the use of corporal punishment as a criminal sanction or an educational disciplinary measure.[91] Regarding the ECtHR's judgment in *Tyrer v UK*[92], the IACtHR held that corporal punishment violates human dignity and physical integrity, and is therefore nothing more than institutionalised violence.[93]

Where children are involved, the state has a heightened responsibility of protection. This is based on Article 19 of the ACHR, which enshrines the right of children to special protection as a result of their status as minors. This obligation falls on families, society, and the state.[94] By way of example, the IACtHR in *Street Children* considered the kidnapping, torture, and murder of five persons, including two minors. Its approach illustrates that determining whether

[87] This has been confirmed in *Ximenes Lopes v Brazil* (Merits, Reparations, Costs) IACtHR Series C No 149 (4 July 2006) para 126; "*Juvenile Reeducation Institute*" *v Paraguay* (Merits, Reparations, Costs) IACtHR Series C No 112 (2 September 2004) para 157.
[88] (Merits) IACtHR Series C No 4 (29 July 1988).
[89] Paras 158 and 165.
[90] Para 187.
[91] (Merits, Reparations, Costs) IACtHR Series C No 123 (11 March 2005).
[92] See the text to part 5 3 1.
[93] Paras 64-70. The use of international law to inform the interpretation of Article 5 is in line with a teleological approach to interpretation. See the text to part 3 6 2.
[94] See the text to part 6 4 3.

there has been a violation of Article 5 requires consideration of the position of the victim, as well as the context in which the violation occurred. The extent of the violation of the victim's human dignity depends on their potential vulnerability and ability to protect themselves.[95] In this regard, some groups may require more protection than others to guarantee their human dignity.[96]

The child-victims in *Street Children* were vulnerable because of their status as minors, further exacerbated by their position as homeless persons and being unlawfully detained.[97] In this regard, the IACtHR drew from the CRC to illustrate the obligations resting on states when children are involved.[98] Reference was made to the right to non-discrimination, the obligation to create conditions for the guaranteed survival and development of the child, and the child's right to special protection, amongst others.[99]

The IACtHR expressed its strong disapproval of the state's systemic violation of the rights of homeless children within its jurisdiction, stating that it constitutes a double transgression. Besides the violation of Article 5, the state's failure to take reasonable steps to care for these children deprived them of the "minimum conditions for a dignified life … preventing them from the 'full and harmonious development of their personality'".[100]

The IACmHR's decision in *Marta Lucia Alvarez Giraldo v Colombia*[101] further connects human dignity with the importance of human relationships. The IACmHR was tasked with determining whether a prison and a judicial authority's refusal to grant the applicant, an inmate, intimate visits with her same-sex partner constituted a violation of her right to respect for her physical, mental, and moral integrity. It was explained that conditions of detainment should be compatible with human dignity. This included being allowed to have contact with friends, partners, families, and legal representatives. Attention was drawn to the sacredness of interpersonal relationships and that, even where persons are detained, the state is obligated to ensure that these relationships are not intruded upon or limited.[102] Because the state's conditions for conjugal visits differentiated based on sexual orientation, the applicant's request

[95] IACtHR Series C No 63 (19 November 1999) paras 157-158, 163 and 166.
[96] V Bohórquez Monsalve & J Aguirre Román "Tensions of human dignity: conceptualisation and application to international human rights law" (2009) 6 *IJHR* 39 53-54.
[97] IACtHR Series C No 63 (19 November 1999) paras 166, 180 and 184.
[98] Reference was made to the following provisions of the CRC: Article 2 (non-discrimination); Article 3 (protection); Article 6 (right to life); Article 20 (children deprived of their families); Article 27 (adequate standard of living); Article 37 (prohibition of torture or other cruel, inhumane or degrading treatment or punishment).
[99] IACtHR Series C No 63 (19 November 1999) paras 194-196.
[100] Para 191.
[101] (Merits) IACmHR Report No 122/18 (5 October 2018) ("*Giraldo*").
[102] Paras 191-192.

for an intimate visit with her partner was denied. While in prison, the applicant was also treated in a manner that showed a strong aversion towards her sexual orientation. She was also addressed in stigmatising language. These incidents, together with her overall experience while imprisoned, was found to have violated her right to human dignity.[103] Thus, *Giraldo* is important for drawing attention to the sacredness of interpersonal relationships, whether heteronormative or non-heteronormative, and its necessity for a dignified life.

In addition to the importance of relationships to a dignified life, the IACtHR has explained the equal importance of self-determination thereto. In its advisory opinion on *Gender Identity, and Equality and Non-discrimination of Same-sex Couples*, the IACtHR reiterated that human dignity is founded on self-determination. This requires that persons be seen as "ends in themselves in accordance with their intentions, aspirations and life decisions" and be treated as equals.[104] Self-determination is central to the right to human dignity, as well as to the right to respect for private life, enshrined in Article 11.[105] The right to respect for private life requires that all persons be allowed to define and develop their aspirations and personalities, and live according to their values, beliefs, and interests.[106] Article 7(1), which contains the right to personal freedom, adds to Articles 5 and 11 that individuals are entitled to make their own decisions as to the organisation of their personal and social lives, placing them as "masters of themselves and their own acts".[107] As such, all persons have a right to choose and live their identities because the right to a dignified life requires it.[108]

6 4 2 Non-discrimination

6 4 2 1 Defining non-discrimination under Article 1(1)

Article 24 of the ACHR enshrines the right to equality before the law and equal protection of the law, thereby establishing an autonomous right to equality. In comparison, Article 1(1) places a general obligation on State Parties to respect and guarantee the rights enshrined under the ACHR without discrimination, making it an accessory right. This is similar to the non-discrimination provisions of the European and international human rights instruments discussed under chapters 4 and 5.

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[103] Paras 216-226.
[104] Advisory Opinion OC-24, IACtHR Series A No 24 (24 November 2017) para 86.
[105] Article 11 provides that all persons have the right to have their honour respected and their dignity recognised, including the right to not have their private life interfered with.
[106] Paras 86-88.
[107] Para 89.
[108] Para 89.

On the one hand, where there is an allegation of discrimination in respect of state obligations to respect and guarantee a right enshrined under the ACHR, the claim should be examined under Article 1(1) read with the substantive provision invoked. On the other hand, where alleged discrimination concerns unequal protection under domestic law, the claim should be examined in terms of Article 24.[109]

The right to equality and non-discrimination stem from the "oneness of the human family and is linked to the essential human dignity of the individual".[110] As such, these rights are inseparable. In its advisory opinion on the *Juridical Condition and Rights of Undocumented Migrants*, the IACtHR explained that the rights to equality and non-discrimination have become part of the *ius cogens* of international law. This is because the "legal structure of national and international public order" rests on these rights, which "permeates all laws".[111]

Like the international and European treaties discussed under chapters 4 and 5, the ACHR does not define discrimination. However, in its application of Articles 1(1) and 24, the IACtHR and IACmHR have put forth several definitions. In *Juridical Condition and Rights of Undocumented Migrants*, discrimination was defined as "any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights".[112] Similarly, in its advisory opinion on the *Gender Identity, and Equality and Non-discrimination of Same-sex Couples*, discrimination was interpreted as referring to treating persons as either superior or inferior to others based on their belonging to a particular group.[113] However, as with other non-discrimination provisions discussed, affirmative action measures aimed at addressing inequalities do not constitute discrimination. In fact, states are obligated to adopt measures to address practices and legislation that are detrimental to particular groups.[114] From the definitions provided, it is clear that there are at least two elements to consider when determining discrimination under the ACHR: (i) there has to exist differential treatment; and (ii) for the differentiation to constitute discrimination, it has to be unreasonable to differentiate under such circumstances.

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[109] *Atala Riffo and daughters v Chile* (Merits, Reparations, Costs) IACtHR Series C No 239 (24 February 2012) para 82. See also, *Fernández Ortega et al v Mexico* (Preliminary Objections, Merits, Reparations, Costs) IACtHR Series C No 215 (30 August 2010) para 184.

[110] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-04 (19 January 1984) para 55. See also, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18, IACtHR Series A No 18 (17 September 2003) para 87.

[111] Advisory Opinion OC-18 (17 September 2003) para 101.

[112] Para 84.

[113] Advisory Opinion OC-24 (24 November 2017) para 61.

[114] Advisory Opinion OC-18 (17 September 2003) para 85. See also, IACtHR Series C No 239 (24 February 2012) para 80.

Where differential treatment is based on one of the listed grounds of Article 1(1), discrimination is presumed. This is because these grounds often relate to "permanent personal traits that an individual cannot dispose of without losing his or her identity … [and involves] groups that are traditionally marginalized, excluded or subordinated".[115] The reference to "any other social status" means that the list of prohibited grounds of discrimination is neither exhaustive nor restrictive. Because discrimination is presumed in these circumstances, it is for the impugned state to prove that the differential treatment is legitimate. The focus is on the state's onus of proof.

In *Yatama v Nicaragua*[116], the IACtHR found that the new electoral legislation of Nicaragua violated the political participation rights of indigenous minorities as the reform meant that only political parties could contest elections.[117] Because political parties are not characteristic of the indigenous minorities of Nicaragua, this section of the population was excluded from political participation.[118] At issue was whether this infringement resulted in a violation of Article 24 read with Article 1(1).

According to the IACtHR, Articles 1(1) and 24 places an obligation on states to take positive and negative measures to ensure that it does not discriminate in its laws or practices and that it promotes equal recognition and protection before the law.[119] This includes that vulnerable and marginalised groups be enabled to exercise their rights on equal terms.[120] The state may restrict the rights provided to certain groups, but may only do so if it can show that reasonable and objective reasons exist that justify the differentiation.[121] As a result, the restriction has to be provided for in law, necessary in a democratic society, reasonable and proportionate to the purpose sought to achieve, and with the least restrictive means available being adopted.[122] Because the new legislation did not consider the position of the ethnic and indigenous minorities, the state was violating its obligation to guarantee the right of all persons to "participate, in equal conditions, in decision-making on matters that affect or could affect their rights and the developments of these communities".[123]

[115] Para 66.
[116] (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 127 (23 June 2005) ("*Yatama*").
[117] para 224.
[118] Para 214.
[119] Para 185.
[120] Para 201.
[121] Para 185.
[122] Para 206.
[123] Para 225.

Similarly, in *López Álvarez v Honduras*[124], the IACtHR explained that where a state seeks to restrict a right that affects individual identity, the restriction acquires a serious nature.[125] In this matter, the applicant was prohibited from speaking his native language while imprisoned, whereas other prisoners were not.[126] The state had to justify its restriction of the applicant's right to freedom of thought and expression enshrined in Article 13(1) of the ACHR.[127] Of relevance is that the applicant's native language was spoken by the Garifuna, an ethnic minority in Honduras. Because the applicant's ability to express his identity was at stake, the IACtHR indicated that the prohibition is serious.[128] As a result, the state therefore had to show that its treatment of the applicant was in the public interest and that this interest outweighed the social need of ensuring the right to freedom of expression.[129] Because the state could not do so, it was found to have violated Article 1(1) read with Article 13(1) as a result of the discrimination suffered by the applicant due to his ethnicity, as well as Article 24, for subjecting the application to unequal treatment.[130]

The *Yatama* and *López Álvarez* judgments illustrate that Articles 1(1) and 24 impose onerous obligations on states to ensure the rights enshrined under the ACHR. Where the nature of the right that is being infringed affects human dignity and self-determination, the onus on the state and the weight of the reasons it should present as justification increases. Against this backdrop, the manner in which IACtHR and IACmHR's went about establishing non-heteronormative SOGIE as prohibited grounds of discrimination will be considered. The decisions discussed below illustrate that the progressive recognition and protection of the rights of persons with non-heteronormative SOGIE does not necessarily have to follow the approach under the European system.[131] Under the Inter-American system, "decriminalisation of homosexuality proceeded the determination that sexual orientation was a protected status under the ACHR".[132]

[124] (Merits, Reparations, Costs) IACtHR Series C No 141 (1 February 2006) ("*López Álvarez*").
[125] Para 2.
[126] Para 100.
[127] Para 164.
[128] Paras 169 and 171-172.
[129] Para 165.
[130] Para 174.
[131] See the text to part 5 3 2.
[132] Vollmer *Queer families* 130.

6 4 2 2 Decisions that established non-heteronormative SOGIE as prohibited grounds of discrimination

Atala Riffo and daughters v Chile[133] is a landmark judgment of the IACtHR for establishing sexual orientation as a prohibited ground of discrimination under Article 1(1) of the ACHR. Of relevance is the IACtHR's discussion on whether the Chilean Supreme Court's decision to remove Ms Atala's daughters from her custody arbitrarily infringed on her right to respect for her private life, and whether it constituted discrimination based on her sexual orientation.

The IACtHR departed from the obligation imposed on State Parties by the ACHR to respect and guarantee the rights enshrined therein without discrimination. As a result, discrimination is *per se* incompatible with the object and purpose of the ACHR.[134] Because the purpose of the ACHR is to protect human rights, the reference to "any other social condition" in Article 1(1) should be given the meaning that is most favourable to ensuring the protection of human rights through non-discrimination.[135]

As a human rights treaty, the ACHR is a living instrument that must be interpreted in a manner that evolves with changing times, reflecting the current state of affairs in the inter-American and global context. Importantly, as expressed by the IACtHR, Article 29 of the ACHR read with the Vienna Convention requires this approach.[136] The IACtHR, therefore, drew from the ICCPR and the ECHR in support of the prohibition of discrimination based on sexual orientation.[137] Considering the general obligation imposed on states by the ACHR in light of the ICCPR and the ECHR, the IACtHR held that "[a] right granted to all persons cannot be denied or restricted under any circumstances based on their sexual orientation".[138] The IACtHR therefore rejected the state's argument that there was a lack of consensus on whether sexual orientation constitutes a prohibited ground of discrimination at the time of the Supreme Court's ruling. Given the historical and structural discrimination that sexual minorities have suffered and continue to suffer, an alleged lack of consensus as to the recognition of persons with non-heteronormative sexual orientation cannot be accepted as a valid argument for restricting their rights.[139]

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[133] IACtHR Series C No 239 (24 February 2012) ("*Atala*").
[134] Para 78. See also, Advisory Opinion OC-04 (19 January 1984) para 53.
[135] Para 84.
[136] Para 83.
[137] Paras 86-90. See the text to parts 4 2 1 and 5 3 2.
[138] Para 93. See also the text to part 5 3 2 2, particularly *Dudgeon* and *Goodwin*.
[139] Para 92. The IACtHR's approach to what constitutes acceptable reasons to restrict the rights of persons with non-heteronormative sexual orientations is similar to that of the ECHR. Although the IACtHR did not make

Having established that sexual orientation is a prohibited ground of discrimination under Article 1(1) of the ACHR, the IACtHR turned to determine whether the Supreme Court's differential treatment of Ms Atala centred around her sexual orientation. If so, discrimination would be presumed, and the state would have to prove that its conduct was justifiable. Where a right is restricted based on sexual orientation, weighty reasons will have to be presented to justify the differentiation.[140]

For purposes of establishing that the applicant was subject to differential treatment, it was sufficient to show that her sexual orientation was taken into account in the decision-making.[141] In this regard, the IACtHR considered the arguments and decisions of the national judiciary as well as the language used.[142] It was clear that the proceedings focused on the potentially harmful consequences of the applicant's sexual orientation for the development of her daughters, and that, as a result, it would be in their best interest to be removed from her care.[143] Because there was a link between the applicant's sexual orientation and the Supreme Court's decision, discrimination was presumed.

The state argued that the Supreme Court's decision was made in the best interests of the children involved. According to the IACtHR, protecting the child's best interests is a legitimate aim that justifies the limitation of various rights.[144] However, determining the child's best interests requires assessing specific parental behaviour, in this case, the applicant's decision to cohabit with her same-sex partner and the "real and proven damage or risk to the child's well-being" and development.[145] This means that mere speculation cannot be relied on and that a causal link has to exist between the applicant's sexual orientation and the real harm caused.[146] If not, the decision would be exclusively based on harmful stereotypes.[147]

It was further alleged that the children experienced social discrimination as a result of their mother's sexual orientation. The IACtHR rejected this argument because should such an argument be accepted, the state would be perpetuating societal intolerance and discrimination against persons based on their non-heteronormative sexual orientation. This would undermine the general obligation imposed on states to ensure the effective guarantee of the rights

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explicit reference to the margin of appreciation doctrine, it is possible to argue that it was applied here. See the text to parts 5 2 2 1 and 5 3 2 2, particularly, *Dudgeon, Goodwin, Smith and Grady*, and *Lustig-Prean*.

[140] Para 124.
[141] Para 94.
[142] Para 95.
[143] Para 96.
[144] Para 108.
[145] Para 109.
[146] Para 130.
[147] Para 125.

enshrined under the ACHR, impede the state from promoting social progress, and ultimately risk legitimising certain forms of discrimination.[148]

The Supreme Court further relied on speculation suggesting that living with their mother and her same-sex partner caused the daughters to confuse sex roles and that this would harm their development.[149] The IACtHR rejected this argument, referring to both national and international jurisprudence where it has been held that there is no evidence suggesting that being raised in a non-heteronormative home, in comparison with a heteronormative one, is detrimental to the development of the child.[150]

Moreover, of significance is the Supreme Court's statement that the applicant, when deciding to cohabit with her same-sex partner, placed her own interests above those of her children.[151] According to the IACtHR, the right to non-discrimination based on sexual orientation extends to a person's expression thereof.[152] Here, the IACtHR drew from the ECtHR's interpretation of the right to respect for private life, stating that all persons have a "right to establish and develop relationships with other people … including the right to establish and maintain relationships with people of the same sex".[153] The right to respect for private life is linked to the right to freedom of expression, self-determination, as well as human dignity.[154] Arguing that the applicant is placing her own interests above those of her daughters not only perpetuates the traditional roles that women are expected to fulfil as caretakers but would require her to denounce an essential part of her identity.[155]

The right to respect for private life under the ACHR is formulated somewhat differently than its corresponding provision under the ECHR.[156] Whereas Article 8 enshrines the right to respect for private life, Article 11 provides that all persons have the right to respect for their honour and to have their dignity recognised. However, Article 11(2) nonetheless provides that "[n]o person may be the object of arbitrary or abusive interference with his private life". Like under the ECHR, private life under the ACHR also does not have an exhaustive definition.[157] The right may be limited, but only where it complies with the same requirements as should be satisfied where discrimination is involved: the restriction should be provided for in law, pursue

[148] Paras 119-120.
[149] Para 123.
[150] Paras 126-129.
[151] Para 132.
[152] Para 133.
[153] Para 135. See the text to parts 5 3 1 and 5 3 2, specifically the discussion on *Pretty* and *Dudgeon*.
[154] Paras 136-137.
[155] Para 140.
[156] See the text to part 5 3 2 2.
[157] Para 162. See the text to part 5 3 2, specifically *Dudgeon*.

a legitimate goal, be suitable, necessary and proportional, "in other words, they must be necessary in a democratic society".[158]

Because sexual orientation is an integral aspect of a person's private life, a decision to interfere therewith must meet the requirements set out. During the Supreme Court proceedings, various aspects of the applicant's private life were exposed in justifying that removing her daughters from her care was in their best interests. Although ensuring the best interests of the child is a legitimate goal, the domestic courts went beyond examining aspects related to her suitability as a parent, acting in a manner that was unsuitable and disproportionate to the aim sought to achieve. As a result, the IACtHR found a violation of Articles 11(2) and 1(1).[159]

Homero Flor Freire v Ecuador[160] concerned a claim that discharging the applicant from the armed forces based on his perceived sexual orientation and engagement in homosexual sexual acts constituted discrimination under Article 1(1) and amounted to unequal treatment under Article 24.[161] The applicant argued that the differentiation between the disciplinary action taken in respect of heterosexual and homosexual sexual acts constituted discrimination. Whereas the former resulted in a maximum 30-day suspension, the latter resulted in discharge.[162]

In considering the claim, the IACmHR explained that a state's decision to adopt measures towards ensuring discipline within its armed institutions is a legitimate aim. However, the means adopted must be crucial to achieving this – it has to be the least restrictive means available.[163] Discharging the applicant based on his engagement in homosexual sexual acts cannot be deemed a reasonable manner to ensure discipline. Rather, it ascribes a:

> "[N]egative moral value to the sexual act between persons of the same sex itself, in addition to promoting the stigmatization of gay, lesbian or bisexual persons, those perceived as such, or those who maintain relations with persons of the same sex inside and outside the armed forces".164

As a result, the means utilised was unsuitable to the aim sought to achieve as it arbitrarily distinguished between persons based on their actual or perceived sexual orientation, resulting

[158] Para 165.
[159] Paras 166-167.
[160] (Merits) IACmHR Report No 81/13 (4 November 2013) ("*Freire*").
[161] Para 16.
[162] Para 18.
[163] Para 107.
[164] Para 111.

in the criminalisation of homosexuality in the armed forces.[165] The state was thus found in violation of Articles 1(1) and 24.[166]

Like *Atala* and *Freire, Duque v Colombia*[167] similarly dealt with a claim of discrimination based on sexual orientation. Of relevance for the discussion is the argument that the state's denial of survival's pension benefits to the applicant violated Articles 1(1) and 24 of the ACHR.[168] Survival's pension benefits were provided to the surviving permanent partners of the deceased. Because the state did not recognise same-sex partnerships, the applicant did not meet the requirements. Thus, only heterosexual partners would qualify.[169]

The IACtHR reiterated that Article 1(1) obligates states not to discriminate in the protection and guarantee of the rights enshrined in the ACHR. Furthermore, Article 24 requires that states provide equal recognition before and protection of the law.[170] Because sexual orientation is a prohibited ground of discrimination under Article 1(1), the state had to show that the differentiation fulfils an imperative social need and that the measure adopted is the only means available to achieve the purpose set out. It was found that the state could not present a reasonable or objective purpose for the differentiation.[171] As a result, the state discriminated against the applicant based on his sexual orientation for not recognising the rights that stem from his same-sex relationship. The IACtHR held that the inheritance rights that stem from permanent partnerships should also be extended to same-sex couples.[172]

Whereas *Atala, Freire,* and *Duque* concerned sexual orientation as a prohibited ground of discrimination, *Luiza Melinho v Brazil*[173] dealt with gender identity. In *Melinho,* it was argued that the state's refusal to allow the applicant to undergo gender affirmation surgery at a public hospital, or to carry the costs incurred for this procedure at a private hospital, violated the applicant's right to equal treatment, a dignified life, as well as respect for her private life. Furthermore, it was contended that the state's refusal resulted in discrimination based on gender identity.[174]

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[165] Para 112.
[166] Para 114.
[167] (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 310 (26 February 2016) ("*Duque*").
[168] Paras 1-2.
[169] Para 95.
[170] Para 94.
[171] Paras 104-107.
[172] Para 124.
[173] (Admissibility) IACmHR Report No 11/16 (14 April 2016) ("*Melinho*").
[174] Paras 2-3.

Because the IACmHR only had to determine whether the matter was admissible, it did not engage with the merits. However, attention was nonetheless drawn to the prohibition of discrimination based on sexual orientation and gender identity as it constitutes "essential components of people's private lives".[175] Moreover, the "right to privacy guarantees spheres of intimacy that neither the state nor anyone else can invade".[176] Based on this statement, Vollmer argues that:

> "Finding a violation of the ACHR from the facts of Melinho would suggest that states not only have negative obligations to respect gender identity but also positive obligations to actively assist in facilitating the amelioration of a trans individuals physical and psychological sex through gender affirmation surgery, when requested".[177]

Atala, *Freire*, *Duque*, and *Melinho* all contributed to establishing various aspects related to protecting the rights of persons with non-heteronormative SOGIE. However, the IACtHR's advisory opinion on the *Gender Identity, and Equality and Non-discrimination of Same-sex Couples*, published in 2017 (5 years after the *Atala* judgment was handed down), is ground-breaking for clarifying states' obligations in respect of recognising, protecting, and ensuring the rights of persons with non-heteronormative SOGIE.

The government of Costa Rica raised five questions in relation to two issues on which it wanted the opinion of the IACtHR. The first issue related to the recognition of non-heteronormative gender identities, and the second to same-sex patrimonial rights.[178] It is significant that before considering the questions posed, the IACtHR first discussed the most recent international understanding of various SOGIE-related concepts.[179] The comprehensive list of terms considered illustrate an awareness of the fluid nature of SOGIE and challenges the constructionist and cultural relativist norm of seeking to define sexual orientation and gender identities within a heteronormative framework. Thus, the IACtHR placed a queer theoretical framework at the centre of its advisory opinion.[180]

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[175] Para 49.
[176] Para 49.
[177] Vollmer *Queer families* 139.
[178] Advisory Opinion OC-24 (24 November 2017) paras 2 and 30.
[179] Para 32. The terms discussed are: sex; sex assigned at birth; gender/sex binary system; intersexuality; gender; gender identity; gender expression; transgender or trans; transsexual person; transvestite; cisgender persons; sexual orientation; homosexuality; heterosexual person; lesbian; gay; homophobia and transphobia; lesbophobia; bisexual; cisnormativity; heteronormativity; and LGBTI.
[180] See the text to part 2 4.

Relying on Article 29 of the ACHR and the Vienna Convention, the IACtHR drew from international and European standards to inform its interpretation of the right to equality and non-discrimination in respect of persons with non-heteronormative SOGIE and the obligations it imposes on State Parties.[181] In discussing these general principles, the IACtHR echoed many of its prior statements.[182] Its repetition of these now established principles confirmed that equality and human dignity are inseparable and that treating a particular group as inferior or superior is incompatible with the purpose of the ACHR.[183]

The IACtHR went further than a mere confirmation of its position in *Atala*, that discrimination based on sexual orientation is prohibited, by specifically considering discrimination based on gender identity and gender expression.[184] According to the IACtHR, gender expression concerns the perception that outsiders have of an individual's membership of a particular group, regardless of whether or not the individual identifies with that group.[185] It explained that:

> "The purpose or effect of discrimination based on perception is to prevent or invalidate the recognition, enjoyment or exercise of the human rights and fundamental freedoms of the person subjected to such discrimination, irrespective of whether that person self-identifies with a specific category. As with other forms of discrimination, the person is reduced to a single characteristic attributed to him or her, without taking into account other personal conditions".[186]

As stated above, all persons have a right to choose and live their identities because the right to a dignified life requires it. The right to identity is part of other rights such as the right to human dignity, personal freedom, and respect for private life.[187] The individual's experience and expression of their sexual orientation and gender is essential hereto. In this context, the IACtHR held that:

> "[R]ecognition of gender identity is necessarily linked to the idea that sex and gender should be perceived as being a part of the constructed identity that is the result of the free and autonomous decision of each person, and without this having to be subject to their genitalia".[188]

[181] Paras 33-51, 54-59, 70-77. See 4 3 2 and 5 3 2.
[182] See the text to part 6 4 2 1.
[183] Para 63.
[184] Paras 77-78.
[185] Paras 78-79.
[186] Para 79.
[187] Paras 90-91.
[188] Para 94.

In its opinion, the IACtHR, more so than the European and international bodies, illustrated a queer legal theoretical approach to the interpretation of the ACHR. This is evident from its understanding that gender is not an objective and unchangeable characteristic. Rather, it depends on the individual's subjective appreciation thereof. This appreciation must be protected and cannot be denied out of fear and social or moral prejudice against persons who do not conform to the behavioural norms of their societies.[189]

A failure to recognise diverse sexual orientations, gender identities or gender expressions has the potential to censure whatever diverges from heteronormative perceptions of sex and gender, sending the message that persons with non-heteronormative SOGIE are not entitled to the equal recognition and protection of their rights.[190] Moreover, a lack of legal gender recognition impedes persons with non-heteronormative gender identities and expressions from exercising other rights, such as the right to education and health, placing them in an even more vulnerable position.[191]

Based on the above, the IACtHR held that states are obligated to respect and ensure the rights of all persons, regardless of their sexual orientations, gender identities or gender expressions.[192] To this end, the right to personal freedom and respect for private life, read with the right to a name (Article 18) and juridical recognition (Article 3), requires that states must provide for legal gender recognition.[193] In support of its decision, the IACtHR drew from domestic jurisprudence of OAS Member States as well as decisions of the UNHCHR and the ECtHR.[194] Of significance is that reference was also made to Principle 3 of the YP, which establishes an obligation on states to ensure that procedures exist for the alteration of personal identification documents and registers so that it corresponds with the individual's identified gender.[195] The IACtHR explained that the procedure for legal gender recognition should allow persons to change their names, sex or gender, and photographs on all personal documents and registers.[196] Importantly, the process should be confidential and only based on the free and informed consent of the applicant.[197]

[189] Para 95.
[190] Para 96.
[191] Paras 113-114
[192] Para 100.
[193] Para 115.
[194] Paras 113-114. See the text to parts 4 2 3, 5 3 1 and 5 3 2 2.
[195] Para 112.
[196] Para 121.
[197] See paras 127-160 for details on the recommended procedure for legal gender recognition.

The Costa Rican State also requested the IACtHR's opinion on which patrimonial rights derive from same-sex relationships. As a point of departure, the IACtHR explained that the patrimonial rights that stem from the emotional relationship between couples are protected. To answer the question posed, the IACtHR had to consider whether same-sex relationships constitute families under Articles 11(2) and 17(1) of the ACHR.[198]

In its opinion, the IACtHR recognised the importance of families as social institutions. The formation of families is a result of the human need for connection, the composition of which has evolved over time. As a result, it is impossible to put forth a literal interpretation or establish the ordinary meaning of the word "family".[199] Furthermore, although Article 17(2) refers to the right of men and women to marry and found a family, its wording does not present an exclusive understanding of marriage. Rather, it simply means that this type of marriage is expressly protected under the ACHR.[200]

Considering the regional context of the ACHR, the IACtHR drew from similar provisions of the ADRDM and the Protocol of San Salvador, stating that none of these texts define families.[201] Reference was also made to the draft texts of the ACHR, with the IACtHR stressing that the absence of a reference to same-sex couples as families is insignificant in light of the increasing acceptance of non-traditional family models under the ACHR.[202]

The IACtHR ultimately turned to a teleological interpretation to determine whether same-sex couples are protected as families. It drew attention to the assumption that drafters use generic terms knowing that the meaning of these terms will change with time.[203] As a result, the IACtHR and the ECtHR's assertion that human rights treaties are living instruments, the interpretation of which must evolve with time, achieved greater significance.[204] The object and purpose of the ACHR is to protect the human rights of all persons without distinction. Therefore, excluding same-sex couples from the protection offered through a restrictive interpretation would defeat this purpose.[205] Rather, Articles 1(1) and 24 require that same-sex couples be recognised as families. Whereas Article 1(1) requires State Parties to not discriminate in the recognition and protection of family rights, Article 24 places an obligation on states to ensure that domestic law provides equal protection to non-heteronormative

[198] Paras 173-174.
[199] Paras 176-177.
[200] Paras 181-182.
[201] Paras 183-184.
[202] Para 186.
[203] Para 189.
[204] Para 187.
[205] Para 189.

families.[206] Principle 13 of the YP, which protects the right to social security and other social protection measures, supports this approach.[207] The IACtHR concluded that protecting the rights of same-sex families goes beyond patrimonial rights and that states have to adapt their domestic legislation to ensure these rights.[208]

With regard to the type of patrimonial rights protected by the ACHR, attention was drawn to several states in the OAS region who have recognised "civil or *de facto* unions, and equal or same-sex marriage", as well as the pension, health, and inheritance rights that derive from marriage.[209] The measures adopted by these states were used to illustrate what can be done to ensure the rights of same-sex couples. The adoption of such measures is critical for compliance with the ACHR as neither Article 11(2), nor Article 17, protect particular family types. In any event, "neither of these provisions can be interpreted to exclude a group of persons from the rights recognised therein".[210]

Asserting that there exists a lack of consensus regarding recognising same-sex marriage, that the purpose of marriage is procreation, or that philosophical or religious convictions dictate that same-sex couples should not be allowed to marry cannot be accepted as legitimate reasons for limiting these rights. Furthermore, differentiating between heteronormative and non-heteronormative relationships "does not pass the strict test of equality because … there is no purpose acceptable under the Convention for which this distinction could be considered necessary and proportionate".[211] The IACtHR expressed criticism towards "creating an institution that produces the same effects and gives rise to the same rights as marriage, but that is not called marriage".[212] This is because it merely serves "to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them".[213] Creating different marriage institutions communicates that non-heteronormative relations are abnormal. As a result, having different unions for same-sex and different-sex partners is prohibited for differentiating based on sexual orientation, and is incompatible with the purpose of the ACHR to protect the rights of all persons without distinction.[214] Finally, the IACtHR reiterated that because human dignity derives from

[206] Para 195.
[207] Para 196.
[208] Paras 198 and 202.
[209] Paras 201 and 206-216.
[210] Para 217.
[211] Paras 219-223.
[212] Para 224.
[213] Para 224.
[214] Para 224.

individual autonomy, it includes the right to choose whom to marry. This right speaks to the most intrinsic aspect of individual identities. Therefore, where there exists an intention to marry, states are obligated to give equal recognition and protection to this intention regardless of sexual orientation.[215]

6 4 3 Education

6 4 3 1 Exploring the misreading of Article 26

During the drafting of the ACHR, there were debates as to whether economic, social, and cultural rights should be included and to what extent. Some of the earlier drafts included extensive references to these rights, reflecting the ICESCR. However, the draft submitted by the IACmHR excluded these references in favour of "only cover[ing] those rights to which American states were actually willing to extend protection".[216] A working group was created to revise the IACmHR's draft, culminating in the current version of Article 26.
Article 26 of the ACHR provides a general right to progressive development, stating that:

> "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires".

Despite recognising the existence of economic, social, and cultural rights, Article 26 does not give substance thereto.[217] Furthermore, the jurisprudence on Article 26 is limited. Most matters brought to the IACmHR and IACtHR under the ACHR have concerned the violation of civil and political rights that occurred under the authoritarian regimes of many OAS states. Moreover, until the IACtHR's decision in *Acevedio Buendia v Peru*[218], the perception was that individuals could not plead the protection of economic, social, and cultural rights. Because the obligation is one of progressive realisation, the argument was that it does not provide a basis for legal action.[219]

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[215] Para 225.
[216] Craven "Protection of Economic, Social and Cultural Rights" in *Inter-American System of Human Rights* 297.
[217] 299.
[218] (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 198 (1 July 2009) ("*Acevedio Buendia*").
[219] L Burgorgue-Larsen "Economic and Social Rights" in L Burgorgue-Larsen & MU De Torres (eds) *Inter-American Court of Human Rights: Case law and commentary* (2011) 613 619-620 and 629.

Melish explains that the perception that Article 26 is not actionable stems from a misreading thereof which understands progressive development as the only obligation.[220] According to this understanding, determining a violation of Article 26 would require the IACtHR to consider "statistical progress or setbacks over broad population aggregates".[221] However, because the IACtHR only has jurisdiction where there is a clear individual victim and a causal connection between the harm suffered and state conduct, it cannot adjudicate on matters of progressive development or realisation. As a result, the IACtHR has preferred to adjudicate social and economic rights under Chapter II of the ACHR, the rights of which are subject to the general obligations set out under Chapter I.[222]

In 2003, 6 years before the *Acevedo Buendia* decision, the IACtHR in *Five Pensioners v Peru*[223] considered the application of Article 26. For purposes of this discussion, it is sufficient to note that it was held that Article 26 can only be invoked where state conduct affects the entire population.[224] However, in a separate concurring opinion, judge Roux Rengifo criticised this position, arguing that the IACtHR's contentious jurisdiction does not authorise it to monitor the general human rights position of a particular state.[225] Melish agrees, drawing attention to that the IACtHR only has jurisdiction where a specific human rights violation is alleged.[226]

Despite the criticism against *Five Pensioners*, Melish explains that its significance lies in the IACtHR's expression of economic, social, and cultural rights having both an individual and collective dimension.[227] Whereas the collective dimension of economic, social, and cultural rights necessitates its progressive realisation, its individual dimension requires State Parties to respect and ensure rights without discrimination through the immediate adoption of appropriate measures.[228] In this sense, the IACtHR signalled that Articles 1(2) and 2 applies to Article 26, as expressed in *Acevedio Buendia*.[229]

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[220] TJ Melish "The Inter-American Court of Human Rights: Beyond progressivity" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 372 375.
[221] 381.
[222] 382 and 384-385.
[223] (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 98 (28 February 2003) ("*Five Pensioners*").
[224] Para 147.
[225] Concurring Opinion of Carlos de Vicente de Roux Rengifo.
[226] Melish "The Inter-American Court" in *Social Rights Jurisprudence* 386.
[227] 387.
[228] IACtHR Series C No 98 (28 February 2003) para 147.
[229] Melish "The Inter-American Court" in *Social Rights Jurisprudence* 387.

As mentioned above, *Acevedio Buendia* was the first judgment in which the IACtHR expressly took a stand on Article 26.[230] The matter concerned a complaint of non-compliance with judgments of the Constitutional Court of Peru, ordering the state to reimburse pension amounts owed after arbitrarily reducing it.[231] The IACmHR alleged violations of Articles 21 (right to property) and 25 (right to judicial protection), read with Article 1(1) of the ACHR.[232] The state raised a preliminary objection, arguing that the IACtHR did not have jurisdiction to rule on the alleged violation of the right to social security as neither the ACHR, nor the Protocol of San Salvador, protects this right.[233] In rejecting this, the IACtHR stated that:

> "As a judiciary organ, this Tribunal, in exercise of the authority vested in it, may determine the scope of its own jurisdiction (*competence de la competence*) … Moreover, the Tribunal has asserted on other occasions, that the broad wording of the Convention indicates that the Court has full jurisdiction over all matters pertaining to its Articles and provisions … [Therefore,] the Court is competent to decide whether the State has failed to comply with or violated any of the rights enshrined in the Convention, even the aspect concerning Article 26 thereof".[234]

With reference to the drafting of Article 26, it was explained that the provision was formulated intentionally wide to allow the IACtHR to give content to social, economic, and cultural rights.[235] The IACtHR indicated that although Article 26 is enshrined in Chapter III (economic, social, and cultural rights) of the ACHR, it is nonetheless part of Chapter I (general obligations), which places an obligation on State Parties to the ACHR to respect all the rights enshrined therein and to adopt legislative and other measures to give effect thereto.[236]

Despite holding that Article 26 is actionable, the IACtHR did not find a violation thereof. Rather, it held that judicial non-compliance was at the core of the matter.[237] As a result, the progressive realisation of social rights was not at stake, but the rights to judicial protection and property. Confusingly, the IACtHR concluded its discussion on whether there was a violation of Article 26 by stating that:

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[230] Burgorgue-Larsen "Economic and Social Rights" in *Inter-American Court* 632.
[231] IACtHR Series C No 198 (1 July 2009) para 2.
[232] Para 3.
[233] Para 12.
[234] Paras 16-17.
[235] Para 99.
[236] Para 100. See also, para 103. The IACtHR referred to General Comment 3 of the CESCR where it was indicated that the reason behind progressive realisation is that the immediate full realisation of economic, social, and cultural rights is not possible. As such, the notion of progressive realisation provides a flexible framework that considers the difficulties that states face in ensuring the full realisation of these rights.
[237] Para 106.

> "[T]he commitment requested from the State by Article 26 of the Convention consist in the adoption of measures … with a view to achieving progressively the full realization of certain economic, social and cultural rights. In this regard, the State's obligation that derives from Article 26 of the Convention is of a different, but complementary, nature to that related to Articles 21 and 25 of that treaty".[238]

This statement contradicts the IACtHR's prior assertion that the same standards of obligations apply to states, regardless of whether Chapter II or Chapter III rights are concerned. However, in *Cuscul Piraval et al v Guatemala*[239] and *Indigenous Communities of the Lhaka Honhat Association (Our Land) v Argentina*[240] the IACtHR illustrated that the obligations imposed under Chapter I of the ACHR, applies to both Chapters II and III provisions.

The IACtHR found a violation of Article 26 for the first time in 2018, in *Cuscul Piraval*. The case concerned the state's failure to provide 49 HIV-positive individuals with medical care from 1994 until 2005, after which the state started to provide some assistance to some of these individuals. However, it was still inadequate and not made available to all HIV-positive individuals.[241] In finding a violation of the right to progressive development, the IACtHR drew attention to Article 34(i) of the OAS Charter which requires states to "devote their utmost efforts to accomplishing the … [p]rotection of man's potential through the extension and application of modern science". Based on the obligation imposed under Article 34(i), the interdependence of human rights, and that human rights treaties are living instruments that must be interpreted in light of societal developments, it was held that Article 26 is justiciable.[242]

With reference to *Poblete Vilches v Chile*, it was furthermore reiterated that Article 26 protects the right to health as a stand-alone right.[243] Moreover, as per its judgment in *Acevedio Buendia*, the IACtHR restated that state obligations in respect of economic, social, and cultural

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[238] Para 105.

[239] (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No 395 (23 August 2018) ("*Cuscul Piraval*"). Case only available in Spanish. For English summary: IJRC "Inter-American Court: State Inaction on HIV Violated Progressive Realization Obligation" (8-11-2018) *IJRC* <https://ijrcenter.org/2018/11/06/inter-american-court-state-inaction-on-hiv-violated-progressive-realization-obligation/> (accessed 16-05-2020). Please note that the discussion on this case is based on the English summary.

[240] (Merits, Reparations and Costs) IACtHR Series C No 400 (6 February 2020) ("*Our Land*"). Case only available in Spanish. For English summary: IJRC "Inter-American Court Decides First Environmental Rights Case Against Argentina" (08-04-2020) *IJRC* <https://ijrcenter.org/2020/04/08/inter-american-court-decides-first-environmental-rights-case-against-argentina/> (accessed 16-05-2020). Please note that the discussion on this case is based on the English summary.

[241] IACtHR Series C No 395 (23 August 2018) para 34.

[242] Paras 97-102. See also, 3 6. This illustrates that the teleological approach of interpretation is embedded in the work of the IACtHR.

[243] (Merits, Reparations and Costs) IACtHR Series C No 349 (8 March 2018).

rights are both immediate and progressive. In respect of the right to health, states have to "immediately ensure access without discrimination to healthcare services … [and] take concrete, continuous steps to increase the full enjoyment of the right to health".[244] With regard to the state's immediate obligations, it was indicated that this increases where "individuals face an imminent risk of serious harm to life or personal integrity".[245] Moreover, although progressive realisation takes into account the resource constraints of the state, the obligation to implement measures towards progressive realisation remains. As such, inactivity is prohibited.[246]

In *Our Land*, the IACtHR again found a violation of Article 26. It was reiterated that the rights guaranteed under this provision derive from the OAS Charter, and that the IACtHR may consider other treaties to which the impugned state is bound in determining a violation of Article 26.[247] Significantly, it was found that the right to a healthy environment, food, access to water, and cultural identity all derive from Article 26. The IACtHR also confirmed that states must take immediate steps to respect and ensure these rights, as well as to adopt measures for its progressive realisation.[248]

Against this backdrop of what Melish has referred to as a misreading of Article 26, and the recent recognition of the justiciability of Article 26, it is understandable that the IACtHR and IACmHR have utilised civil and political rights in order to protect economic, social, and cultural rights under the ACHR, including the right to education. In this regard, the right to a dignified life and the child's right to special protections has played a significant role.

6 4 3 2 Interpreting the right to education through children's right to life and special protection

Article 26 refers to the standards articulated in the OAS Charter. The right to education is amongst these, contained in various provisions of the OAS Charter. Article 49 enshrines an explicit right to education, providing for compulsory and cost-free elementary education for

[244] IACtHR Series C No 395 (23 August 2018) para 98. Quote from English summary: IJRC "Inter-American Court: State Inaction on HIV Violated Progressive Realization Obligation" *IJRC*.
[245] Para 146. Quote from English summary.
[246] Para 146.
[247] IACtHR Series C No 400 (6 February 2020) paras 195-196.
[248] Paras 221, 229-230 and 242. See also, paras 186-189 and 208. Importantly, it was held that states have an obligation to prevent environmental harms. If this is not possible, the state must restore the situation to what it was prior to the occurrence of the harm. Because the state was aware of the interference with the rights of the indigenous communities and did not take adequate steps to prevent the harm caused, it failed in its duties and was held liable.

school-aged children.[249] Although the state is not obligated to provide middle-level education to all, it must extend it "progressively to as much of the population as possible". According to Article 3(n), education "should be directed towards justice, freedom, and peace", with Article 34(h) requiring states to "expand educational opportunities for all". Article 47 places a further obligation on states to encourage education, orienting it toward the "overall improvement of the individual, and as a foundation for democracy, social justice, and progress". These provisions illustrate a comprehensive right to education that provides access to education, but also expands on what education should seek to achieve.

The IACtHR and IACmHR have not found violations of the right to education under Article 26 of the ACHR. This is a direct result of the development of the jurisprudence discussed in part 6 4 3 1. The IACtHR and IACmHR have nonetheless aimed to protect the right to education through the right to life and children's right to special protection.

Article 4(1) of the ACHR guarantees the right to life, stating that "[e]very person has the right to have his life respected" and that "[t]his right shall be protected by law". In turn, Article 19 of the ACHR guarantees that "[e]very minor child has the right to measures of protection required by his condition as a minor on the part of his family, society, and the state". This is an additional right that accrues to children above the rights enshrined in the ACHR that they are also entitled to.[250]

Street Children, was the first case in which the IACtHR referred to the right to life as including the right to a dignified life.[251] States have an obligation to ensure the existence of "conditions that guarantee a dignified existence".[252] Article 4(1) read with Article 19 requires states to take steps that enable children to "harbor a project of life that should be tended and encouraged", as well as to prevent violations of "their physical, mental and moral integrity".[253] Importantly, the IACtHR drew extensively from the CRC in finding that the measures of protection referred to under Article 19 include guaranteeing the development of the child without discrimination.[254]

For example, in *Street Children*, the IACtHR referred to at-risk children being victims of double aggression where states violate their rights or allow third parties to do so. Although this

[249] See the text to part 6 4 3 1.
[250] IACtHR Series C No 112 (2 September 2004) para 147. See also, Advisory Opinion OC-24 (24 November 2017) para 149.
[251] See the text to part 6 4 3 1.
[252] IACtHR Series C No 63 (19 November 1999) para 144.
[253] Para 191.
[254] Para 196.

statement was made in relation to homeless children as a vulnerable group, children with non-heteronormative SOGIE can arguably also be perceived as an at-risk group in educational settings. Their non-compliance with normative patterns of behaviour makes them stand out and makes them more susceptible to discrimination and violence.

The IACtHR's advisory opinion on the *Juridical Condition and Human Rights of the Child* provides the foundation for children's rights under Article 19.[255] The IACmHR requested that the IACtHR interpret the CRC insofar as it "might contribute to specify the scope of the [ACHR]". According to the IACtHR, it is authorised to "interpret any treaty as long as it is directly related to the protection of human rights in a member state of the inter-American system".[256] This includes instruments that were not adopted under the auspices of the OAS. To illustrate this point, reference was made to the *Street Children* judgment, where the IACtHR used the CRC to give content to Article 19 of the ACHR.[257] Moreover, because all parties to the ACHR have ratified the CRC, there exists "a broad international consensus … in favor of the principles and institutions set forth in that instrument".[258] Butler argues that, in this way, the IACtHR "effectively imported provisions of the CRC into the [ACHR]".[259]

Although Article 19 does not define what a child is, the IACtHR in its advisory opinion on the *Juridical Condition and Human Rights of the Child*, defined a child as a person under the age of 18.[260] Unlike children, adults have the capacity to exercise their rights in a personal and direct way. Because children lack this capacity, other adults, whether parents, guardians, or representatives, act on their behalf. However, children are nonetheless holders of the same inalienable and inherent human rights as adults.[261]

Despite the ACHR's commitment to equal treatment and non-discrimination, differential treatment of children will not constitute discrimination where it aims to protect them, "taking into consideration [their] situation of greater or lesser weakness or helplessness".[262]

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[255] Advisory Opinion OC-17, IACtHR Series A No 17 (28 August 2002).
[256] Para 22. See also, Advisory Opinion OC-10/89, IACtHR Series A No 10 (14 July 1989) para 44.
[257] Paras 23-24. See also, IACtHR Series C No 63 (19 November 1999) paras 188 and 194.
[258] Para 29.
[259] I de Jesús Butler "The rights of the child in the case law of the Inter-American Court of Human Rights: Recent cases" (2005) 5 *HRLR* 151 166. See also, Melish "The Inter-American Court" in *Social Rights Jurisprudence* 377-378. Melish explains that Article 29(b) of the ACHR (which provides that none of its provisions may be interpreted in a manner that restricts rights recognised in domestic legislation or international treaties that State Parties are bound by) has allowed the IACtHR to utilise the CRC and the Protocol of San Salvador to give content to Article 19. References to these treaties ensure that the ACHR remains a living instrument and is "vital for the progressive inclusion … of more detailed and nuanced guidelines on economic, social and cultural rights".
[260] IACtHR Series A No 17 (28 August 2002) para 38.
[261] Para 41.
[262] Para 46.

Nevertheless, the differentiation must not lack reasonable or objective justification.[263] This approach is in line with international law, which aims to ensure the full and harmonious development of the child.[264] Here, the IACtHR drew from Article 2 of the CRC and Article 24(1) of the ICCPR, which recognises the right of the child to protection without discrimination based on their condition as a child. The right of the child to special protection is tied to the principle of the best interests of the child, which derives from their human dignity.[265] Considering Article 3 of the CRC, the IACtHR held that, despite the best interests principle not being expressly provided for in the ACHR, it should be used as a point of departure wherever decisions are made on the effective realisation of children's rights.[266] In this manner, the best interests principle has been read into Article 19.

The child's right to protection and the need to act in their best interests places an obligation on states to adopt measures to the maximum of their available resources towards this purpose, with due consideration given to the situation of the specific child.[267] Provision should also be made for children to participate in decision-making that affects their rights or future. Here, Article 12 of the CRC offers guidance, stating that the weight attached to a child's views depends on their age and development.[268] The IACtHR explained that it is necessary to adjust the degree of participation allowed because "there is great diversity in terms of physical and intellectual development" amongst children.[269]

Relying on *Street Children*, the IACtHR reiterated that the right to life requires states to provide conditions that are conducive to children's development.[270] Attention was drawn to the importance of the right to education as an important mechanism through which the right to a dignified life is to be realised, and which contributes to the protection of children from unfavourable situations.[271] It is also "through education that the vulnerability of children is overcome".[272] In this sense, the IACtHR explained that the right to education derives from Article 4(1). Moreover, in light of Articles 3 and 4 of the CRC and Article 16 of the Protocol of San Salvador, the child's right to protection also enshrines the right to education.[273] As such,

[263] Para 55.
[264] Para 52.
[265] Para 56.
[266] Para 59.
[267] Paras 51 and 60. See also, paras 87 and 91.
[268] Para 99.
[269] Para 101.
[270] Para 80. See also, (Merits) IACtHR Series C No 63 (19 November 1999) para 144.
[271] Para 84.
[272] Para 86.
[273] Paras 62-64.

both Articles 4(1) and 19 protect this right.[274] Of particular importance is the IACtHR's statement that "education and care for the health of children require various measures of protection and are the key pillars to ensure enjoyment of a decent life by the children".[275] Regardless of the significance of education to the development of the child and its connection to various rights, the IACtHR did not mention it in relation to Article 26.[276]

In *Juvenile Re-education Institute v Paraguay*, the IACtHR considered the impact of inhumane conditions at a juvenile institute on the children who were held there.[277] For purposes of this discussion, the statements made in relation to the right to life, respect for physical, mental, and moral integrity, as well as the child's right to special protection, are important. Because the state has heightened control over prisoners, it has to take special care to ensure their rights to life and humane treatment.[278] Where children are involved, the state "must be all the more diligent and responsible in its role as guarantor and must take special measures based on the principle of the best interests of the child".[279] Here, the IACtHR drew from Articles 6 and 27 of the CRC to illustrate that the child's right to life requires states to ensure the survival and development of the child.[280] In discussing the content of incarcerated children's right to a dignified life, reference was made to the obligation on states to put in place "special periodic health care and education programs".[281] This is because all children, regardless of being incarcerated or not, have the right to an adequate education.[282] According to the IACtHR:

> "Such measures are of fundamental importance inasmuch as the children are at a critical stage in their physical, mental, spiritual, moral, psychological and social development that will impact, in one way or another, their life plan".[283]

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[274] Para 84.
[275] Para 86.
[276] See also, *Mónica Carabantes Galleguillos v Chile* (Friendly Settlement) IACmHR Report No 33/02 (12 March 2002) paras 1-2, 10 and 14. The matter concerned a teenage girl who was expelled from an educational institution because her being pregnant was against the moral and ethical standards of the school. The state admitted that it violated the applicant's right to respect for her honour and dignity and her right to equal protection. The state further recognised that it failed to comply with the general obligation imposed on it to respect and ensure the rights enshrined in the ACHR without distinction, and that it has to adopt legislative and other measures for this purpose. Although the matter clearly concerned a violation of the right to education, Article 26 was not considered. However, the redress agreed upon was nonetheless focused on ensuring the applicant's right to education. For example, the state agreed to provide the applicant with a scholarship to complete her higher education, as well as to disseminate the amendments to the Education Act on access to education for pregnant students and nursing mothers.
[277] (Merits, Reparations, Costs) IACtHR Series C No 112 (2 September 2004) paras 1-5.
[278] Paras 151-153 and 156-157.
[279] Para 160.
[280] Para 161.
[281] Para 172.
[282] Para 174.
[283] Para 172.

Girls Yean and Bosico v Dominican Republic[284] concerned the refusal of birth certificates and nationality to children of Haitian descent, born in the Dominican Republic.[285] The petitioners argued that the State's refusal rendered the children stateless, making them vulnerable to discrimination and the non-recognition of their rights.[286] Of particular relevance was the impact of the refusal of a birth certificate on one of the children's ability to attend public school. Because she did not have a birth certificate, she could not be registered at a public school. As a result, she had to attend evening classes, meant for adults. According to the IACtHR, this "exacerbated her situation of vulnerability, because she did not receive the special protection, due to her as a child, of attending school during appropriate hours together with children of her own age, instead of with adults".[287] In this regard, the IACtHR indicated that Articles 19 and 26 read with the CRC and the Protocol of San Salvador requires that the State "provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development".[288] Similar to the matters discussed above, the IACtHR applied the CRC to the ACHR to develop the scope of children's rights.

Although finding a violation of the right of the child to juridical personality and her right to special protection, Melish criticises the IACtHR's decision in *Yean and Bosico*, stating that "without a clear merits-based finding of State responsibility for violating the young girl's right to education, that core violation was left without a substantive remedy".[289] The IACtHR's order was silent on the reforms required in relation to the registration procedures at public schools to ensure that other children do not suffer similar harm in the future.[290]

The child's right to protection also dictates that no violence against children can be justified.[291] In its *Report on Corporal Punishment and Human Rights of Children and Adolescents,* the IACmHR explained that the use of corporal punishment on children in the inter-American system is prohibited because it contradicts the notion that children are entitled to special protection, and infringes on their rights to personal integrity, a dignified life, and not to be subjected to degrading treatment or punishment.[292] Reference was also made to the CRC

[284] (Preliminary Objections, Merits, Reparations and Cost) IACtHR Series C No 130 (8 September 2005) ("*Yean and Bosico*").
[285] Para 3.
[286] Para 179.
[287] Para 185.
[288] Para 185.
[289] Melish "The Inter-American Court" in *Social Rights Jurisprudence* 406.
[290] 406.
[291] IACmHR "Report on Corporal Punishment and Human Rights of Children and Adolescents" (5 August 2009) OEA/Ser.L/V/II.135 para 3.
[292] Para 23.

as setting the standards for protecting children, as provided for under Article 19 of the ACHR, confirming the statement made in *Street Children*.[293] The IACtHR explained that the best interests of the child principle requires that decisions be made in a manner that guarantees children the effective enjoyment of their rights and ensure their full and harmonious development.[294] In light of the best interests principle, states are obligated to adopt both positive and negative measures to protect children against "any form of violence … in every realm and by any method".[295] This is particularly important in settings where children are in the custody of the state, such as at schools.[296]

In *Atala*, the IACtHR explained that Article 8(1) adds to Article 19 that children have the right to be heard in all proceedings that affect their rights.[297] In interpreting Articles 8(1) and 12 of the CRC, which concern the child's right to be heard, should be considered.[298] The IACtHR referred extensively to General Comment 12 of the Children's Committee, stressing the relationship between the best interests of the child and the weight to be given to children's views on decisions that have an impact on their lives.[299]

The point of departure when ensuring that children have the right to be heard is that they are capable of expressing their views. In this regard, children do not have to illustrate a comprehensive understanding of the matter, but merely a sufficient understanding. This requires that children be informed of the possible decisions that can be made, as well as the corresponding consequences. The weight attached to a particular child's view should depend on their capacity and not be uniformly based on their biological age. However, it should be borne in mind that "children exercise their rights progressively as they develop a greater degree of personal autonomy".[300]

Article 12 not only guarantees children the right to be heard, but requires that their views be taken into account.[301] This means that where conflict exists between the child's view and parental or institutional authorities, the child's views can only be disregarded where "weighty and profound arguments" are presented.[302] The argument presented is that this interpretation can be extended to Article 19 in general, as this can contribute to ensuring that children are

[293] Para 16.
[294] Paras 25-26.
[295] Paras 28 and 31.
[296] Para 36.
[297] See the text to part 6 4 2 2.
[298] IACtHR Series C No 239 (24 February 2012) para 196.
[299] Para 197.
[300] Paras 198-199.
[301] Para 200.
[302] Para 206.

provided with the special protection due to them, while considering their views on their best interests.

It is important to note the IACtHR's statement in its advisory opinion on *Gender Identity, and Equality and Non-discrimination of Same-sex Couples* that children too have the right to legal gender recognition.[303] Protecting children requires "encourag[ing] their development, offering them the conditions required to be able to live and develop their capabilities taking full advantage of their potential".[304] The IACtHR stipulated that where decisions are made to protect children, including the "design of public policies and … the drafting of laws concerning childhood", the four principles set forth in General Comment 5 of the CRC Committee must be considered.[305] The IACtHR also drew from to Articles 7(1) and 8 of the CRC, which provides that all children have the right to a name and to have their identity preserved. According to the IACtHR, these two provisions support the notion that children have the right to self-determination.[306] Based on these considerations, the IACtHR held that the statements made regarding the right to legal gender recognition and the procedure to be adopted apply equally to children who wish to alter their personal documents to correspond to their identified gender. However, this right should be understood in the context of Article 19 of the ACHR and the four guidelines established by the CRC Committee. A restriction on the right of the child to legal gender recognition for purposes of protecting the child must be "justified based on these principles and should not be disproportionate".[307]

Recently, the IACtHR in *Guzmán Albarracín v Ecuador*[308] issued its first judgment regarding sexual violence against children in schools. The matter concerned the sexual abuse of a schoolgirl, Paola del Rosario Guzmán Albarracín, by her vice principal. Although school officials were aware of the ongoing abuse, no one intervened. Moreover, when Paola approached the school's doctor, concerned about being pregnant, he refused to assist her unless she had sex with him. Soon thereafter, she committed suicide.[309] The IACtHR found the state

[303] Advisory Opinion OC-24 (24 November 2017).
[304] Paras 149-150.
[305] Paras 151-152. See the text to part 4 6 3. These principles are: (i) non-discrimination; (ii) the best interests of the child; (iii) respect for the child's right to life, survival, and development; and (iv) respect for the child's views in all matters concerning them.
[306] Para 153.
[307] Para 154.
[308] (Merits, Reparations and Costs) IACtHR Series C No 405 (24 June 2020) (*Guzmán Albarracín*"). Case only available in Spanish. For English summary: IJRC "Inter-American Court issues first judgement on sexual violence in schools" (26-08-2020) *IJRC* <https://ijrcenter.org/2020/08/26/inter-american-court-issues-first-judgment-on-sexual-violence-in-school/> (accessed 24-11-2020). Please note that the discussion on this case is based on the English summary.
[309] IJRC "Inter-American Court issues first judgement on sexual violence in schools" (26-08-2020).

to be in violation of Paola's right to education under the Protocol of San Salvador, as well as her rights to life, human dignity, and humane treatment under the ACHR read with the right of the child to special protection.[310] As to the right to education, the IACtHR held that children have the right to be safe and free from sexual violence at school. In this regard, states have to take steps to "protect girls and adolescents from sexual violence in schools, including by monitoring the situation, developing policies of prevention, and establishing simple mechanisms for accountability".[311] Moreover, the right to education includes the right to sexual and reproductive education.[312]

In light of the IACtHR's judgment in *Atala* and its advisory opinion on *Gender Identity, and Equality and Non-discrimination of Same-sex Couples*, it is argued that this should be interpreted to mean that children with non-heteronormative SOGIE are also entitled to be safe and free from sexual violence at schools and that sexual and reproductive education includes non-heteronormative SOGIE. This is further supported by the reference made in *Guzmán Albarracín* as to the "role of patriarchal norms, gender stereotypes, the power imbalance between students and educators, and multiple discrimination in sexual violence against girls and adolescents".[313]

Unlike under the ICESCR, CRC, ECHR, ESC(r), and the ADRDM, the jurisprudence regarding the right to education under the ACHR is much more complex.[314] This is a result of the IACmHR and IACtHR failure to recognise Article 26 as justiciable. However, considering the discussion here in light of the *Cuscul Piraval* and *Our Land* judgments, the expectation is that the IACmHR and IACtHR will not refrain from finding a violation of the right to education under Article 26 in the future. However, in *Guzmán Albarracín*, the IACtHR did not find a violation of the right to education under Article 26, but rather under the Protocol of San Salvador. The IACmHR and IACtHR have, nonetheless, given content to the right to education through their interpretation of civil and political rights, as well as by drawing from Article 19 of the ACHR and provisions of the CRC. The result is the guarantee of a comprehensive range of rights for children, adding content to their right to education. Significantly, the explicit recognition of the rights of children with non-heteronormative SOGIE provides a clear

[310] Para 276.1. See, IJRC "Inter-American Court issues first judgement on sexual violence in schools" (26-08-2020).
[311] Para 120. See, IJRC "Inter-American Court issues first judgement on sexual violence in schools" (26-08-2020).
[312] IJRC "Inter-American Court issues first judgement on sexual violence in schools" (26-08-2020).
[313] Para 142. See, IJRC "Inter-American Court issues first judgement on sexual violence in schools" (26-08-2020).
[314] See the text to parts 4 4 3, 4 6 4, 5 4 3, 5 5 and 6 3 3.

framework for the protection of their right to education and their equal protection in the educational environment.

6 5 Further developments in the region: The Protocol of San Salvador and the Convention of Belém do Pará

6 5 1 Protocol of San Salvador

With the adoption of the ACHR, the IACmHR commenced a discussion on the promotion and protection of economic, social, and cultural rights. The Protocol of San Salvador was adopted in 1988 as the standard-setting economic, social, and cultural rights document of the region.[315] The Preamble of the Protocol is similar to that of the ACHR, confirming that all persons have essential rights that flow from their inherent human dignity and that these rights are therefore worthy of protection.

The Protocol of San Salvador protects a wide range of economic, social, and cultural rights, including the right to education.[316] The Protocol imposes three overarching obligations on State Parties to ensure the realisation of the rights contained therein: (i) to adopt measures; (ii) to enact domestic legislation; and to (iii) guarantee the rights set forth without discrimination of any kind.[317] In this regard, states have to take steps within their available resources for the progressive realisation of the rights contained in the Protocol.[318]

Article 19 of the Protocol of San Salvador provides for its implementation. The Working Group on the Protocol of San Salvador was created in 2007 and is responsible for the monitoring and implementation.[319] Member states are required to submit periodic reports to the Working Group. After examining these reports, recommendations are made.[320] The ACHR grants unrestricted competence to the IACtHR and the IACmHR to adjudicate the rights

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[315] For information on the drafting of the Protocol, see, OAS "Preliminary Draft Additional Protocol to the American Convention on Human Rights (Pact of San Jose)" (20 November 1981) AG/Res. 619 (XII-08/82); OAS "A-52 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"" (2020) *OAS* <https://www.cidh.oas.org/Basicos/English/Basic6.Prot.Sn%20Salv%20Ratif.htm> (accessed 03-06-2020); M Craven "The Protection of Economic, Social and Cultural Rights under the inter-American System of Human Rights" in DJ Harris & S Livingstone (eds) *Inter-American System of Human Rights* (1998) 289 307-308.

[316] Articles 11, 13 and 16.

[317] Articles 1-3.

[318] Article 1. These duties are similar to those set out in Article 2 of the ICESCR, discussed under sub-heading 3 4 3 of chapter 3. However, whereas the Protocol require State Parties to adopt measures to the extent allowed by their available resources, the ICESCR requires this to the maximum of available resources.

[319] OAS "Protocol of San Salvador: Composition and Functioning of the Working Group to Examine the Periodic Reports of States Parties" (5 June 2007) AG/Res. 2262 (XXXVII-O/07).

[320] Reports available at: OAS "Protocol of San Salvador" (2020) *OAS* <http://www.oas.org/en/sare/social-inclusion/protocol-ssv/> (accessed 06-06-2020).

contained therein. In comparison, Article 19(6) of the Protocol of San Salvador provides this mandate to these bodies only where a violation of trade union rights[321] or the right to education[322] is attributable to a member state. These two provisions are, therefore, the only ones that may be directly invoked under the Protocol and in terms of which individual petitions may be brought.[323]

Despite the wide range of rights protected under the Protocol, the nature of the monitoring and implementation of the Protocol means that there is little jurisprudence available on its interpretation. Nevertheless, the IACtHR has referred to the Protocol in its interpretation of rights enshrined in the ACHR.[324]

The IACtHR's judgment in *Gonzales Lluy v Ecuador* and *Guzmán Albarracín* are the only two matters in which a violation of the right to education under the Protocol of San Salvador was found.[325] Because *Guzmán Albarracín* was discussed under 6 4 3 2, only *Gonzales Lluy* is discussed here. The relevant facts pertain to the expulsion from school of an HIV-positive child based on the supposed risk she posed to the right to life of the other learners and staff at the school. Domestic courts held that the expulsion was justifiable, as the right to life of a group of persons outweighs the individual's right of access to education. Moreover, the domestic courts found that she could still access education through individual and distance learning.[326]

Although the IACtHR found a violation of Article 13 of the Protocol of San Salvador in relation to Articles 1(1) and 19 of the ACHR, the discussion centred on the obligation resting on states to ensure that HIV-positive individuals are not discriminated against in accessing education.[327] The IACtHR reaffirmed that HIV-status is included as a prohibited ground of discrimination under the reference to "any other status" under Article 1(1).[328] Restricting a right on these grounds requires the state to bring serious reasons as justification, with a proportional relationship having to exist between the means employed and the legitimate aim

[321] Article 8(a).
[322] Article 13.
[323] See also, T J Melish "Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas" (2007) 39 *International Law and Politics* 171 233. Article 19(6) does not mean that the other rights enshrined under the Protocol are not justiciable. Melish explains that because all these rights are protected under the ADRDM and the ACHR, the IACmHR and IACtHR "enjoy unrestricted contentious subject-matter jurisdiction" and the "direct approach may be used to protect these rights vis-à-vis every American state".
[324] See the text to parts 6 4 2 and 6 4 3.
[325] (Preliminary objections, merits, reparations and costs) IACtHR Series C No 298 (1 September 2015).
[326] Paras 133-144.
[327] Para 291.
[328] Para 255.

sought to be achieved.[329] The IACtHR found that the expulsion from school of the child was based solely on prejudicial statements of the child's teacher and the school's director pertaining to her HIV-status, disregarding the medical evidence showing an almost non-existent risk of the disease being passed on to other children or persons in the school environment.[330]

Despite the protection of the right to life of other learners being a legitimate aim, the IACtHR held that the individual circumstances of the child were not taken into consideration.[331] Rather than evaluating the real and proven risk or harm, the domestic courts relied on speculation.[332] The means chosen "constituted the most harmful and disproportionate of those available to meet the objective of protecting the integrity of other children at the school".[333] Expelling the child from attending school infringed on her right to education under the Protocol of San Salvador, preventing her from benefitting from the developmental aims of education as set forth under the CRC, aimed at reducing children's vulnerability.[334]

6 5 2 Convention of Belém do Pará

The Convention of Belém do Pará was adopted in 1994 to prevent, punish, and eradicate violence against women as it is "an offense against human dignity and the manifestation of the historically unequal power relations between women and men".[335] Moreover, violence against women affects their enjoyment of all other rights and freedoms, preventing "their full and equal participation in all walks of life".[336] The Convention has been ratified by 32 out of the 34 OAS Member States[337]

Chapter IV of the Convention provides the mechanisms of protection and implementation. State Parties must submit reports to the inter-American Commission of Women ("Women's Commission") on the measures taken to address violence against women.[338] In 2004, the

[329] Para 257.
[330] Para 264.
[331] Para 265.
[332] Para 270.
[333] Para 274.
[334] Para 278.
[335] Preamble to the Convention of Belém do Pará.
[336] Peamble.
[337] OAS "About the Belém do Pará Convention" (2020) *OAS* <https://www.oas.org/en/mesecvi/convention.asp> (accessed 05-06-2020).
[338] Article 10 of the Convention of Belém do Pará. See also, Articles 11-12. State Parties and the Women's Commission may request an advisory opinion from the IACtHR on the interpretation of a Convention provision. Any legally recognised person, group of persons or non-governmental organisation in a particular state may also bring a claim against that particular state concerning and alleged violation of Article 7, which sets out the state obligations in respect of the Convention.

Follow-up Mechanism to the Belém do Pará Convention ("MESECVI") was established.[339] It operates through a multi-lateral evaluation round, during which Member States have to provide information on its compliance with the Convention based on a questionnaire. The MESECVI then makes recommendations, published in hemispheric reports.[340]

The relevance of the Convention to the topic of this chapter lies in its definition of violence against women. In terms of Article 1, violence against women refers to "any act or conduct, based on *gender*, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere" [own emphasis].[341] Considering this definition in light of the reports, recommendations, and declarations of the MESECVI, it is clear that "woman" is to be understood as all persons who identify as women. In these publications, the MESECVI has expressed concern over violence and discrimination against women based on their non-heteronormative SOGIE and how it exacerbates their vulnerability and impacts their enjoyment of other rights and freedoms. The MESECVI has also explained the necessity to provide sexual and reproductive healthcare to all women and drew attention to domestic legislation that incorporates non-heteronormative SOGIE rights.[342]

According to Article 6(a), the right of women to be free from violence includes the right to not be discriminated against, including their right to equal protection of the law. It further includes the right of all women "to be valued and educated free of stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority and subordination".[343] Article 5 enshrines the right of women to economic, social, and cultural rights, indicating that they "may rely on the full protection of those rights as embodied in regional and international instruments on human rights". Related hereto is the obligation on states to address the prejudices and customs which support the idea that women are inferior to men through education, to remove the legitimisation of violence against women.[344]

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[339] OAS "What is MESECVI" (2020) *OAS* <http://www.oas.org/en/mesecvi/about.asp> (accessed 06-06-2020).
[340] OAS "The MESECVI process" (2020) *OAS* <http://www.oas.org/en/mesecvi/process.asp> (accessed 06-06-2020). MESECVI is also empowered to follow up on the progress made in states.
[341] The Convention of Belém do Pará does not include a separate definition of "women". Rather, "women" is defined as part of "violence against women". This is similar to the approach under CEDAW, discussed in part 4 5 2.
[342] OAS "General Recommendation of the Committee of Experts of the MESECVI (No. 2): Missing Women and Girls in the Hemisphere" (2018) 9 and 27; OAS "Third Hemispheric Report in the Implementation of the Belém do Pará Convention" (2017) paras 160-166; OAS "Declaration on violence against women, girls and adolescents and their sexual and reproductive rights" (19 December 2014) OEA/Ser.L/II.7.10 MESECVI/CEVI/DEC.4/14 15; OAS "Second Follow-Up Report of the Recommendations of the Committee of Experts of the MESECVI" (2014) paras 18 and 246.
[343] Article 6(b) of the Convention of Belém do Pará.
[344] Article 8(b).

Considering these provisions, the Women's Commission and MESECVI have explained that states are required to guarantee "education in sexual and reproductive rights for all [children] according to their age" and should "integrate a gender and human rights perspective" in the curriculum.[345] States should also:

> "Include the issue of masculinities in all educational curricula in order to guide the socialization of boys and girls, with an emphasis on health and respectful gender and power relations, peaceful conflict resolution and the exercise of sexuality in conditions of equality and free from discrimination".[346]

Considering the references made to the rights of women with non-heteronormative SOGIE, together with the expressions made regarding ensuring equal access to education for all women, including comprehensive sexual health education, it is argued that there is real potential for development under the Convention of Belém do Pará towards more explicit protection in the education environment of those who identify as women and the inclusion in the curriculum of diverse sexual and reproductive health education.

6 5 Conclusion

As is evident from the discussion in this chapter, the strongest support for the rights of persons with non-heteronormative SOGIE is found under the inter-American system. Compared to the treaties discussed in chapters 4 and 5, the OAS treaty bodies have made great strides towards the comprehensive recognition and protection of equal rights for persons of non-heteronormative SOGIE in a manner not yet seen under the international and European systems. This is a result of the willingness of the IACmHR and the IACtHR to give expression to the fundamental value of human dignity, as well as a teleological approach to interpretation.

This chapter discussed the unique approach of the inter-American system in developing the rights of persons with non-heteronormative SOGIE in general, drawing attention to how these rights are provided for in the educational environment. Although the ADRDM, Protocol of San Salvador, and the Convention of Belém do Pará all contribute to this, it is the IACtHR's interpretation of the ACHR that has placed the inter-American system at the global forefront of legal developments in this field.

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[345] OAS "Hemispheric Report on Child Pregnancy in the States Party to the Belém do Pará Convention" (2016) para 38; OAS "Declaration on violence against women" 7 and 14; OAS "Declaration of Pachua: Strengthening efforts to prevent violence against women" (27 May 2014) OEA/Ser.L/II.5.32 CIM/CD/doc.16/14 rev.310 10.
[346] OAS "Declaration of Pachua" 10.

In discussing the ADRDM and the ACHR, the importance of human dignity and the notion of a dignified life for the protection of all other rights enshrined therein was explained. Ensuring the right to human dignity requires states to ensure equality before the law, and equal protection of the law, requiring that discrimination be prohibited. The discussion proceeded to illustrate that the IACmHR and the IACtHR have, through their respective mandates, established the clear prohibition of discrimination based on sexual orientation, gender identities, and gender expressions under the ACHR. The ADRDM too prohibits discrimination on these grounds. However, the jurisprudence is less developed as a result of most OAS states being bound by the ACHR, claims therefore having to be considered in terms thereof.

The right to education under the ADRDM is similar to the ICESCR, CRC, ECHR, and the ESC(r). In contrast, the development of the right to education under the ACHR has been more complex as a result of the formulation and initial interpretation of Article 26. Because the IACmHR and IACtHR have not yet had the opportunity to interpret the right to education in light of Article 26, it remains to be seen what the content thereof will be. However, based on the tendency of the IACmHR and the IACtHR to draw from the right to a dignified life and the child's right to special protection under the ACHR in protecting the right to education, and the recourse made to the CRC and the Protocol of San Salvador, the expectation is that the right to education will be interpreted similarly to the CRC.

The significance of the IACtHR's approach to the protection of the rights of the child is the incorporation of broad principles under Article 19. These principles were drawn from the CRC and include the right to non-discrimination, the best interests of the child, the right of the child to be heard, as well as their right to life, survival, and development. It has great potential for further developing the right to education of children with non-heteronormative SOGIE under the inter-American system as these principles must inform all decisions made in giving effect to the rights of the child. Moreover, the IACtHR's proclamation in its advisory opinion on *Gender Identity, and Equality and Non-discrimination of Same-sex Couples* as to the right of the child to legal gender recognition is particularly telling for future developments pertaining to all children's rights, including their right to education.

Chapter 7 will provide an analysis of the right to education of children with non-heteronormative SOGIE under the ACHPR, the ACRWC, and the Maputo Protocol. Because the African human rights system is much younger than the international, European, and inter-American human rights systems, there has been less development of the rights of persons with non-heteronormative SOGIE, in general. Regardless, the African Commission and African Court have delivered a substantial body of jurisprudence. Furthermore, both the African

Commission and the African Court have drawn extensively from the international, European, and inter-American human rights systems in their interpretation of the right to human dignity and the right to non-discrimination, in particular. Chapter 7, therefore, incorporates the principles established under chapters 4 to 6 insofar as it can assist in establishing an interpretation of the right to education of children with non-heteronormative SOGIE under the ACHPR, the ACRWC, and the Maputo Protocol.

7 The right to education of children with non-heteronormative SOGIE under regional African human rights law

7 1 Introduction

This chapter focuses on the ACHPR, the ACRWC, and the Maputo Protocol. Similar to the discussions in chapters 4 to 6, this chapter aims to provide an interpretation of the right to human dignity, non-discrimination, and the best interests of the child that protects the right to education of children with non-heteronormative SOGIE. The point of departure of this chapter is that the ACHPR, the ACRWC, and the Maputo Protocol provide equal rights to all persons, including those with non-heteronormative SOGIE. It is argued that, through the ACRWC, the rights guaranteed under these treaties also extend to children.

In the interpretation of these instruments, it is important to bear in mind that there has been no decision dealing specifically with the rights of persons with non-heteronormative SOGIE by the African Commission, the African Court or the ACERWC. This is in stark contrast with the international, European, and inter-American systems, all of which have established the rights of persons with non-heteronormative SOGIE. However, as pointed out in chapter 1, this is what makes analysing the African regional human rights system, in light of the international and other regional human rights systems, so critical. This examination enables the research to make recommendations as to how African human rights bodies could, and arguably should, interpret the right to education of children with non-heteronormative SOGIE.

7 2 The African human rights system

Established with the adoption of the Charter of the Organisation of African Unity ("OAU Charter")[1] in 1963, the African human rights system is the youngest regional human rights system. The OAU Charter was adopted against the backdrop of the liberation of the continent from colonisation. It focused on self-determination, the protection of the independent state, and creating African unity.[2] The OAU transformed itself into the AU in 2000 with the adoption of the Constitutive Act of the African Union.[3] The shift was necessitated by the increasingly democratic political landscape of the African continent.[4] Like the OAU Charter, the

[1] (adopted 25 May 1963).
[2] R Murray *Human Rights in Africa: From the OAU to the African Union* (2004) 7-9.
[3] (adopted 11 July 2000). See also, African Union "Member States" (2020) <https://au.int/en/member_states/countryprofiles2> (accessed 18-092020). The AU has 55 member states, representing all countries on the African continent.
[4] F Viljoen "The African Regional Human Rights System" in C Krause & M Scheinin (eds) *International Protection of Human Rights: a textbook* (2012) 551 552.

Constitutive Act of the AU reiterated the importance of African unity. Importantly, it includes explicit references to the promotion and protection of human rights as an objective of the AU.[5] In this way, human rights play a more significant role under the AU than under the OAU.[6]

The ACHPR was adopted in 1981 by the OAU and entered into force in 1986.[7] Comparable to the human rights treaties discussed under chapters 4 to 6, the purpose of the ACHPR is to promote and protect the human rights of all persons. In its Preamble, the ACHPR recognises that "fundamental human rights stem from the attributes of human beings which justifies their national and international protection". As a result, all forms of discrimination must be eradicated.

The ACHPR protects a wide range of civil and political rights, as well as economic, social, and cultural rights. Although the drafters drew inspiration from existing international and regional systems, the ACHPR is unique in that it also protects peoples' rights and requires that African values and historical traditions be taken into consideration in the interpretation of the rights enshrined therein.[8]

Similar to the human rights treaties discussed under chapters 4 to 6, the ACHPR requires member states to recognise the rights and freedom enshrined therein and to "adopt legislative or other measures to give effect to them".[9] The point of departure is that states bind themselves to human rights instruments aware of the obligations imposed upon them.[10] Upon ratification, states therefore undertake to bring its legislation and practices in line with the ACHPR as soon as possible and must take immediate steps to do so.[11] In this regard, the African Commission

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[5] Article 3(h).

[6] Murray *Human Rights in Africa* 32-33.

[7] 22; Viljoen "The African Regional Human Rights System" in *International Protection of Human Rights* 552. See also, D Chirwa "African Regional Human Rights System" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 323 323. The adoption of the ACHPR was a result of international pressure over the dictatorships of the 1970s in Uganda, Equatorial Guinea, and the Central African Republic, encouragement by the UN for the establishment of a regional human rights regime, and a recognition that the human rights situation in African states is of concern to each individual state.

[8] Viljoen "The African Regional Human Rights System" in *International Protection of Human Rights* 570-571: Although not defined in the ACHPR, "peoples" have been interpreted to refer to all persons living in a state, as well as distinct groups. See also, Preamble to the ACHPR; *Jawara v Gambia* (Communication No 147/95; 149/96) [2000] ACHPR 17 (11 May 2000) para 173 ("*Jawara*"); *Legal Resources Foundation v Zambia* (Communication No 211/98) [2001] ACHPR 31 (7 May 2001) ("*LRF v Zambia*") para 73.

[9] Article 1 of the ACHPR. See also, (Communication No 147/95; 149/96) para 46; *Amnesty International v Sudan* (Communication No 48/90; 50/91; 52/91; 89/93) [2018] ACHPR 11 (15 November 2018) para 42 ("*Amnesty International*"). According to the African Commission in *Jawara*, "Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore, a violation of any provision of the Charter, automatically means a violation of Article 1". Moreover, in *Amnesty International*, the African Commission explained that Article 1 requires states to bring its legislation in line with the ACHPR.

[10] *Purohit v the Gambia* (Communication 242/01) [2003] ACHPR 49 (29 May 2003) ("*Purohit*") para 41.

[11] Paras 42-43.

in *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*[12] explained that state parties to human rights treaties are obligated to "respect, protect, promote, and fulfil" all rights enshrined therein.[13]

The African Commission and the African Court oversee and ensure the implementation of the ACHPR. The ACHPR created with it the African Commission, which started functioning in 1987.[14] The African Commission has both a protective and promotional mandate. Whereas its protective mandate is concerned with considering complaints of alleged violations of the ACHPR, its promotional mandate is concerned with examining state reports and adopting corresponding thematic and country-specific resolutions aimed at enhancing the protection of human rights in African states.[15] Although it has a protective mandate, the African Commission is not empowered to "grant remedies to redress the violations nor to enforce its orders".[16] Rather, the Commission compiles a report with recommendations which is sent to the impugned state.[17]

Articles 60 and 61 of the ACHPR provides that, in the interpretation of the ACHPR, the Commission shall draw from international law, including the UN Charter, UDHR, and other UN-based treaties. In terms of Article 60 of the ACHPR, recourse should be had to human rights treaties that AU member states are bound to.[18] Moreover, Article 61 provides that other international conventions and "African practices consistent with international norms" should also be considered insofar as it sets out recognised legal principles.[19] With regard to these two provisions, the African Commission in General Comment 2 established that international and

[12] (Communication No 155/96) [2001] ACHPR 34 (27 October 2001) ("*SERAC*") paras 44-47.
[13] Paras 44-47. The obligation to respect places a negative duty on the state and requires it to "refrain from interfering in the enjoyment of all fundamental rights". The failure to comply with a negative obligation may, therefore, constitute a violation of the ACHPR. In contrast, the obligation to protect, promote, and fulfil requires positive action from the state. Protection demands the adoption of legislation and provision of effective remedies where rights have been infringed. This is tied to the duty to promote, which expects states to create conditions for the realisation of all rights. Finally, the obligation to fulfil, similar to the duty to promote, requires states to "move its machinery towards the actual realisation of the rights".
[14] Article 30 of the ACHPR.
[15] Articles 45-47, 55-56, and 66. See also, Parts Two and Three of the Rules of Procedure of the African Commission on Human and Peoples' Rights (adopted 2 to 13 February 1988, revised from 19 February to 4 March 2020, entered into force 2 June 2020).
[16] Chirwa "African Regional Human Rights System" in *Social Rights Jurisprudence* 335.
[17] 335: According to Chirwa, implementing the findings of the African Commission has been sparse as a result of a lack of political will from African states. The African regional human rights system has, therefore, been described as the least effective of the regional systems.
[18] Article 60 of the ACHPR.
[19] Article 61.

regional human rights treaties are valuable for setting benchmarks to measure the application and interpretation of the ACHPR against.[20]

The African Court was created in 1998 with the adoption of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights ("Protocol").[21] With the entering into force of the Protocol in 2004, an independent court with advisory and contentious jurisdiction was established.[22] The African Court's advisory jurisdiction allows it to "provide an opinion on any legal matter relating to the Charter or any other relevant human rights instrument".[23] There have been limited requests for advisory opinions. Apart from one, all requests have been struck out, withdrawn, or declared as inadmissible under Article 4(1) of the Protocol for not being submitted by an African organisation recognised by the AU.[24]

In terms of the African Court's contentious jurisdiction, and considering their overlapping mandates, it is from the outset important to note two main distinctions between the African Commission and the African Court. First, the African Court's judgements are binding. Second, the African Court is empowered to grant remedies where a violation has been found.

The African Court's contentious jurisdiction only applies in respect of states who have ratified the Protocol. The African Commission provides indirect access to the Court, regulated by the amended Rules of Procedure of the African Commission on Human and Peoples' Rights, which entered into force on 2 June 2020. Rule 130 provides that the Commission may, prior to its decision on the admissibility of a communication, refer that communication to the Court. However, this is dependent on the relevant state having ratified the Protocol. If a

[20] African Commission "General Comment 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (adopted 28 April-12 May 2014) para 2.

[21] (adopted 10 June 1998, entered into force 25 January 2004).

[22] Articles 4-5 of the African Court Protocol. See also, Parts IV (contentious procedure) and V (advisory procedure) of the Rules of the African Court on Human and Peoples' Rights (entered into force 2 June 2010).

[23] Article 4 of the African Court Protocol.

[24] African Court "Advisory Proceedings" (2020) <https://en.african-court.org/index.php/cases/2016-10-17-16-19-35#finalised-opinions> (accessed 26 July 2020). See also, *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (Advisory Opinion) (2014) 1 AfCLR 725. This is the only advisory opinion that has been delivered. It did not concern the interpretation of a substantive provision of the ACHPR. Rather, the question posed was whether the Committee of Experts, the enforcement mechanism of the ACRWC, has standing before the African Court. It was held that the Committee of Experts may request an advisory opinion, but that it cannot submit a contentious matter to the African Court. Currently, there is one opinion pending before the African Court. As a result, the advisory opinions of the African Court are of limited value for purposes of the research.

communication is referred to the Court, the African Commission also becomes an applicant to the proceedings.[25]

For individuals or non-governmental organisations to have direct access to the African Court, Article 5(3) requires states to make an Article 34(6) declaration.[26] However, of the 55 member states to the AU, only 30 are party to the African Court Protocol. Of the 30, only ten states have made this declaration. However, of these 10, 4 have withdrawn.[27] As such, there is a clear issue of *locus standi* in bringing complaints of alleged human rights violations to the Court. Nonetheless, most matters have reached it via the direct access route.[28]

In terms of its contentious jurisdiction, Articles 3(1) of the African Court Protocol empowers the Court to consider complaints of alleged violations of the ACHPR, as well as "any other relevant human rights instrument ratified by the States concerned". Article 7 adds to this that the Court may apply the ACHPR and other relevant human rights treaties. This is unique to the African system, allowing the Court to directly apply UN treaties, including finding a violation of a UN treaty, as long as the state concerned has ratified that treaty. For example, in *Omary and Others v Tanzania*[29], the African Court relied on Article 3(1) of the African Court Protocol and Article 60 of the ACHPR in holding that it is authorised to draw inspiration from the UDHR. Furthermore, despite the UDHR not being a ratifiable human rights instrument, it nonetheless constitutes a human rights instrument for purposes of Article 3(1) of the African Court Protocol.[30]

In light hereof and considering that each of the UN treaties discussed under chapter 4 have been ratified by most African states, the Court has an exceptionally wide material jurisdiction if compared to the UN treaty bodies and the other regional human right courts.[31] Furthermore,

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[25] Rules of Procedure of the African Commission on Human and Peoples' Rights (adopted 2 to 13 February 1988, revised from 12-26 May 2010, entered into force August 2010). The current provision regulating access to the Court is, arguably, a much more watered-down version than Rule 118 of the previous set of rules, which was in force from 2010 until 2020. This rule allowed the Commission to refer communications to the Court if states did not comply with its recommendations or provisional measures, where a situation of "serious or massive violations of human rights" was brought to its attention, or where it was deemed necessary during any stage of examining a communication, but before a decision is made on the merits. For a discussion of Rule 118, see: F Viljoen "Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights" (2018) 67 *ICQL* 63 75-84.

[26] As of 23 November 2018, nine states have made an Article 34(6) declaration. These are: Burkina Faso (1998), Malawi (2008), Mali (2010), Tanzania (2010), Ghana (2011), Côte d'Ivoire (2013), Rwanda (2013), Benin (2016), and the Gambia (2018)

[27] African Court "Declarations entered by member states" (2020) *African Court* <https://www.african-court.org/en/index.php/basic-documents/declaration-featured-articles-2> (accessed 07-12-2020)

[28] Viljoen (2018) *ICQL* 65.

[29] (admissibility) (2014) 1 AfCLR 358.

[30] Paras 71-77.

[31] See, OHCHR "Status of Ratification Interactive Dashboard" (2020) *ohchr* <https://indicators.ohchr.org/> (accessed 17 November 2020). The number of African states that have ratified the UN treaties discussed under

the wording of Article 3(1) suggests that it is possible to allege a violation of a UN treaty without having to simultaneously allege a violation of the ACHPR.[32] As is illustrated in this chapter, the Court can, in this way, be influential in shaping the right to education of children with non-heteronormative SOGIE by drawing from and applying UN treaties.

The ACRWC, the regional equivalent of the CRC[33], was adopted in 1990 and entered into force in 1999.[34] The ACRWC stemmed from the increasing recognition of the impact that regional conflict has on children's well-being and is a call to action for states to protect children's rights.[35] Furthermore, it represents an African perspective on the CRC. Nonetheless, the ACRWC is meant to complement the CRC, enhancing children's rights in Africa.[36] In this regard, it is significant that the ACRWC was adopted in 1990, only one year after the CRC was adopted, and the same year that it entered into force.

The African system is the only regional system with a children-specific human rights treaty. The purpose of the ACRWC, like the CRC, is to promote and protect the rights of the child. Protecting children is necessary due to their physical and mental vulnerability. Children should also be protected to ultimately ensure their full and harmonious development.[37] What makes the ACRWC unique is an appreciation of the critical conditions that complicate the development of the African child, as well as its recognition of the role of "cultural heritage, historical background and the values of the African civilization" on the understanding of children's rights.[38]

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chapter 4 is: ICCPR – 52; ICESCR – 50; CRC – 54; CEDAW – 52. Here, it is also important to note that the UN does not recognise the Sawari Arab Democratic Republic as a state, whereas it is recognised as a member of the AU.

[32] Viljoen "The African Regional Human Rights System" in *International Protection of Human Rights* 438.

[33] See discussion under chapter 4, part 4 5.

[34] The Declaration on the Rights and Welfare of the Child (AHG/ST.4 Rev.l) (adopted 17-20 July 1979) was the precursor to the ACRWC. For more information on the drafting and coming into force of the ACRWC, see: F Viljoen "Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" (1998) 31 *CILJSA* 199-212; B D Mezmur "Happy 18th birthday to the African Children's Rights Charter: not counting its days but making its days count" (2017) 1 *AHRY* 125-139.

[35] Murray *Human Rights in Africa* 164-165. For a critical discussion on the reasons behind the adoption of the ACRWC, see: F Viljoen *International Human Rights Law in Africa* (2012) 2ed 391-397.

[36] A Lloyd "Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: raising the gauntlet" (2002) 10 *IJCR* 179 182.

[37] Preamble to the ACRWC, paras 5-6. The special measures set out in the Preamble include that children "grow up in a family environment in an atmosphere of happiness, love and understanding" and that they receive "particular care with regard to health, physical, mental, moral and social development". To this end, children require "legal protection in conditions of freedom, dignity and security".

[38] Para 7.

The ACRWC created with it the ACERWC.[39] The ACERWC is mandated to promote and protect the rights enshrined in the ACRWC, monitor its implementation, and to issue general comments on the interpretation of its provisions.[40] In terms of its monitoring mandate, states have to submit reports to the ACERWC outlining the measures adopted to give effect to the obligations imposed by the ACRWC, as well as the progress made in this regard.[41] Its protective mandate allows it to receive communications of alleged violations of the ACRWC.[42] Comparable to the mandate of the African Commission, the ACERWC is empowered to adopt recommendations; however, it also cannot take a binding decision, reducing its effectiveness.[43]

In carrying out its functions, the ACERWC may, in general, draw from international human rights law. Article 46 of the ACRWC specifically refers to "instruments adopted by the United Nations".[44] As such, the CRC is of particular importance to the interpretation of the ACRWC. Based on this exposition, Viljoen's assertion that the Committee of Experts "has more extensive powers than its UN equivalent" is justifiable.[45]

Whereas the ACRWC focuses on the rights of the child, the Maputo Protocol, which entered into force in 2005, aims to promote the equal treatment of women in Africa and ensure their equal enjoyment of human rights.[46] The Maputo Protocol was adopted to supplement the provisions of the ACHPR and is the African regional equivalent of CEDAW and similar to the Convention of Belém do Pará.[47]

The Maputo Protocol is significant for speaking to issues of particular concern to African women.[48] Considering the conclusion in chapter 2 that "African public life has been and still is dominated by men", a women-specific instrument is essential to ensure the effective

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[39] Article 32.

[40] Article 42. See also, Rule 58 of the Revised Rules of Procedure; ACERWC "Terms of reference for country and thematic rapporteurs of the ACERWC" (2019) <https://www.acerwc.africa/wp-content/uploads/2019/10/ToR_establishing_the_Offices_of_rapportuers_of_the_ACERWC.pdf> (accessed 08-09-2020). This rule authorises the ACERWC to establish country and thematic rapporteurs. The ACERWC established 10 rapporteurs at its 30th Ordinary Session, held in 2017. Importantly, a thematic rapporteur on education was established. To date, no reports have been published.

[41] Article 43.

[42] Article 44.

[43] Viljoen "The African Regional Human Rights System" in *International Protection of Human Rights* 557.

[44] Article 46 of the ACRWC.

[45] Viljoen "The African Regional Human Rights System" in *International Protection of Human Rights* 553.

[46] For more information on the drafting of the Maputo Protocol, see: Viljoen "The African Regional Human Rights System" in *International Protection of Human Rights* 250-251.

[47] Article 66 of the ACHPR provides that "[s]pecial protocols or agreements may, if necessary, supplement the provisions of the present Charter".

[48] See the text to part 7 4 1.

realisation of African women's rights.[49] This is because, despite the ratification of the ACHPR and other international human rights treaties prohibiting it, women continue to experience discrimination and harmful practices against them.[50]

The African Commission and the African Court are responsible for monitoring compliance of the Maputo Protocol. Similar to the ACHPR, state parties to the Maputo Protocol have to submit periodic reports to the African Commission on the "legislative and other measures undertaken for the full realisation of the rights therein recognised".[51] In November 2010, Guidelines for State Reporting under the Maputo Protocol were adopted, requiring states to cover specific topics on their domestic compliance with the obligations imposed.[52] Furthermore, the African Court is responsible for dealing with "matters of interpretation arising from the application or implementation of this Protocol".[53]

The ACHPR, ACRWC, and the Maputo Protocol should be interpreted in terms of the Vienna Convention. Unlike the regional systems discussed under chapters 4 to 6, there are sparse references to, or application of, the teleological approach by the African Court, African Commission, or the ACERWC. The presumption is nonetheless that the teleological approach as outlined in the Vienna Convention applies. This is, firstly, becausethe Vienna Convention does not distinguish "human rights treaties from the umbrella of other general treaties".[54] As a result, Amin explains that human rights instruments fall under the definition of "treaty" provided in the Vienna Convention.[55] Amin, writing in the context of socio-economic rights under the ACHPR, further argues that the teleological approach is particularly important in the African context as it ensures that the instruments are interpreted consistent with current conditions and remain reflective of changing times.[56] Secondly, the African Court has considered the Vienna Convention in relation to ACHPR, albeit sparsely.[57] Of particular

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[49] Viljoen "The African Regional Human Rights System" in *International Protection of Human Rights* 249-250. See the text to parts 2 5 and 2 6.
[50] Preamble to the Maputo Protocol, para 12.
[51] Article 26.
[52] The Guidelines for State Reporting requires that states report on its implementation of the Maputo Protocol is the same report that covers its compliance with the ACHPR. Considering the basic reporting of states in relation to the Maputo Protocol, combining these reports have been detrimental to its implementation.
[53] Article 27 of the Maputo Protocol. There has only been one case brought in terms of this provision: *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Mali* (merits) (2018) 2 AfCLR 380 ("*APDF*"). See also the text to part 7 5.
[54] A Amin *A teleological approach to the interpretation of socio-economic rights in the African Charter on Human and Peoples' Rights* LLD thesis, Stellenbosch University (2017) 51.
[55] 51.
[56] 33-34 and 62-63.
[57] In *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34 para 108, the African Court drew from Article 27 of the Vienna Convention in holding that the Tanzanian state cannot cite domestic law as justification for its non-compliance with Article 13(1) of the

relevance is the references made to Article 31 in the Court's advisory opinions. In the *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child*, the Court recognised that the "purposive theory or presumption is one of the tools, if not the most important, of interpreting or construing a legal instrument".[58] Therefore, the African Court has established the applicability of the Vienna Convention to the ACHPR, as well as the ACRWC. Because the Maputo Protocol is a Protocol to the ACHPR, the Vienna Convention applies to it as well.

7 3 ACHPR

7 3 1 A unique right to human dignity

The Preamble of the ACHPR refers to the OAU Charter, which includes dignity as an "essential objective for the achievement of the legitimate aspirations of the African peoples". Dignity is an underlying value of the ACHPR and informs all the rights enshrined therein. It is also an explicit right provided for under Articles 4 and 5, the latter of which is of particular importance to the current discussion.

Regarding the right to respect for the sanctity of life under Article 4, it suffices to note that the African Court and African Commission have given a broad interpretation to this right. In General Comment 3,[59] the right to life is interpreted as including the right to a dignified life, requiring that all the rights recognised under the ACHPR be realised.[60] Of significance is the reference made to the importance of the progressive realisation of economic, social, and cultural rights for a dignified life, later reiterated by the Chairperson of the Working Group on Economic, Social, and Cultural Rights.[61] This iteration recognises, in a broad sense, the interdependence between, for example, the right to education as a social right and the ability

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ACHPR. *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (2016) 1 AfCLR 540 para 54 referred to the indirect application of Article 56 of the Vienna Convention to Rwanda's withdrawal from the African Court Protocol.

[58] (2014) 1 AfCLR 725 paras 84 and 92. See also, *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* (Advisory Opinion) (2017) 2 AfCLR 57. Here, the African Court relied on Article 31 in holding that only African organisations that are recognised by the AU, and not any of its other organs, may request an advisory opinion from the Court in terms of Article 4(1) of the African Court Protocol. See further: *Urban Mkandawire v Malawi* (admissibility) (2013) 1 AfCLR 283 (separate opinion of Niyungeko J) para 9, where Niyungeko J, in his separate opinion, referred to the guiding role of Article 31 of the Vienna Convention in relation to the Court's interpretative mandate.

[59] African Commission "General Comment No 3 on the African Charter on Human and Peoples' Rights: the right to life (Article 4)" (4-18 November 2015).

[60] Paras 3 and 6.

[61] Para 43. See also, African Commission "Working Group on Economic, Social and Cultural Rights" (18 April-2 May 2012) *African Commission* <https://www.achpr.org/sessions/sessionsp?id=108> (accessed 04-08-2020).

of individuals to have a dignified life. In light hereof, Vollmer explains that human dignity derives from and informs all the rights enshrined under the ACHPR.[62]

Through Article 4, the African Court in *African Commission on Human and Peoples' Rights v Kenya*[63] established the relationship "between the right to life and the inviolable nature and integrity of the human being", also recognising that all individuals are entitled to the right to life, regardless of their group belonging.[64] The Court acknowledged that violations of economic, social and cultural rights can result in a violation of the right to a dignified life.[65] However, it was explained that such a violation does not, per se, result in a violation of Article 4. Nonetheless, Vollmer argues that a denial of certain economic and social rights based on the individual's non-heteronormative SOGIE constitute an infringement of Article 4.[66]

In comparison to Article 4, Article 5[67] contains a more explicit and comprehensive right to human dignity, providing for three interrelated rights. First, respect for the individual's inherent human dignity. Second, recognition of the individual's legal status. Third, the prohibition of inhuman or degrading treatment or punishment. As a point of departure, it should be noted that the prohibition of cruel, inhuman, and degrading treatment is absolute.[68] Furthermore, because treatment prohibited under Article 5 can take various forms, determining whether the right to human dignity has been violated requires consideration of the unique circumstances of each case.[69]

Purohit v the Gambia guides the interpretation of Article 5. In this matter, the Lunatics Detention Act, which prescribed the "automatic and indefinite institutionalisation" of anyone described as a "lunatic", was challenged.[70] The complainants argued that this constituted a violation of the right to non-discrimination and equal protection of the law.[71] Moreover, it was put forth that the existence and implementation of the Act infringed on the right to human dignity and the prohibition of degrading treatment.[72]

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[62] Vollmer *Queer families* 242.
[63] (merits) (2017) 2 AfCLR 9 ("*African Commission v Kenya*").
[64] Paras 152-153.
[65] Para 153.
[66] Vollmer (2019) 243.
[67] Article 5 provides that "[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".
[68] *Huri-Laws v Nigeria* Communication 225/98 (2000) AHRLR 273 para 41. See also, *Guehi v Tanzania* (merits and reparations) (2018) 2 AfCLR 477 para 131.
[69] (2018) 2 AfCLR 477 para 129.
[70] (Communication 242/01) para 44.
[71] Para 44. See the text to part 7 3 2.
[72] Para 55.

According to the African Commission, human dignity is "an inherent basic right which all human beings … are entitled to without discrimination".[73] Here, a clear link between the respect for human dignity and the right to non-discrimination is established. The right to human dignity also places an obligation on all persons to respect the inherent dignity of others.[74] As such, inhuman or degrading treatment or punishment is prohibited. To protect the inherent dignity of all persons, inhuman or degrading treatment or punishment should be interpreted to include the "widest possible protection against abuses, whether physical or mental".[75] As a result, the right to human dignity is violated when persons are exposed to "personal suffering and indignity".[76]

Applying these principles to the facts, the African Commission held that referring to persons with mental illnesses as "lunatics" and "idiots" is undignifying, thereby recognising the impact of degrading language on human dignity.[77] The following statement of the African Commission also provides insight into the meaning of human dignity under the ACHPR, stating that:

> "[M]entally disabled persons would like to share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human being. Like any other human being, mentally disabled persons or persons suffering from mental illnesses have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This right should be zealously guarded and forcefully protected by all States party to the African Charter in accordance with the well-established principle that all human beings are born free and equal in dignity and rights".[78]

Clearly in the African system, like the UN,[79] European,[80] and inter-American[81] systems, human dignity is tied to the individual's life project and requires the existence of certain minimum conditions to constitute a dignified life. Importantly, states must guard the individual's right to pursue their life project and create the necessary societal conditions for this. Despite the

[73] Para 57.
[74] Para 57.
[75] (Communication 242/01) para 58. See also, *Media Rights Agenda v Nigeria* (Communication 224/98) [2000] ACHPR 24 (6 November 2000) para 71; *Curtis Doebbler v Sudan* (Communication 236/2000) [2009] ACHPR 103 (25 November 2009) para 37.
[76] (Communication 242/01) para 58. See also, *International Pen, Constitutional Rights Project, INTERIGHTS on behalf of Ken Sara-Wiwa Jr. and Civil Liberties Organisation v Nigeria* (2000) AHRLR 21 para 79; *Modise v Botswana* (Communication 97/93) [2000] ACHPR 25 (6 November 2000) para 91.
[77] (Communication 242/01) para 59.
[78] Para 61.
[79] See the text to parts 4 3 1 and 4 4 1.
[80] See the text to parts 5 3 1 and 5 4 1.
[81] See the text to parts 6 3 1 and 6 4 1.

statement being made in the context of persons with mental disabilities or illnesses, it is argued that these standards apply to all persons without discrimination. The presumption is, therefore, that the right to human dignity and the conception thereof set forth here should extend to persons with non-heteronormative SOGIE by virtue of their being human beings, born free and equal in dignity and rights.

Whereas *Purohit* dealt with the rights of the disabled as a vulnerable group, *Nubian Community in Kenya v the Republic of Kenya*[82] concerned the violation of numerous rights of the Nubian people, a vulnerable minority ethnic group in Kenya. The Nubian people were brought from Sudan to Kenya by British colonialists. However, despite being established there, they were not recognised as citizens of Kenya.[83] It was argued that the denial of legal status to the Nubian people infringed on their right to human dignity, which informs all other rights enshrined in the ACHPR.[84] This is because legal recognition is an "indispensable requirement for the enjoyment rights enshrined in the Charter".[85] Citing the IACtHR's decision in *Yean and Bosico*,[86] the African Commission held that placing burdensome requirements for Nubian people to obtain identification documents because of their religious and ethnic association places them in a vulnerable position as it complicates their enjoyment of the rights that they are entitled to in terms of the ACHPR.[87]

In *Open Society Justice Initiative v Côte d'Ivoire*,[88] the African Commission again considered the impact of legal recognition on the right to human dignity. At issue was a policy that made nationality dependent on both parents being Ivorian citizens. The outcome of this policy was social and political exclusion, which restricted access to various rights.[89] With reference to the Preamble, the African Commission described human dignity as:

> "[T]he soul of the African human rights system … and inherent to the human person. In other words when the individual loses his dignity, it is his human nature itself which is called into question … In short, when dignity is violated, it is not worth the while to guarantee most of the other rights".[90]

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[82] (Communication 317/06) [2015] (19-28 February 2015) ("*Nubian Community*").
[83] Para 5.
[84] Para 137.
[85] Para 138.
[86] IACtHR Series C No 130 (8 September 2005) para 179: According to the IACtHR, "the failure to recognize juridical personality harms human dignity, because it denies absolutely an individual's condition of being a subject of rights and renders [them] vulnerable to non-observance of [their] rights by the state or other individuals". See also the text to part 6 4 3 2.
[87] (Communication No 317/06) [2015] para 149.
[88] (Communication No 318/06) [2015] (19-28 February 2015).
[89] Paras 4 and 9.
[90] Para 139.

Dignity, therefore, underlies all other rights. In particular, according to the African Commission, the right to legal status has "a supreme and dependent relationship with the right to dignity".[91] Here, the African Commission referred to the partly concurring and partly dissenting opinion of Vučinić J in the ECtHR's decision of *Kuric v Slovenia* in which a similar statement was made.[92] The right to legal recognition also places a corresponding obligation on the state to respect and provide for it. The Ivorian state's failure to comply herewith was found to reduce the individual's capability to enjoy various other rights enshrined in the ACHPR. In light of these considerations, it was held that making nationality dependent on both parents having to be Ivorian citizens constituted a serious infringement of the right to human dignity because it compromised the existence of these individuals within Côte d'Ivoire.[93]

The African Commission's statements in *Open Society Justice Initiative v Côte d'Ivoire* about the relationship between legal personality and human dignity may provide insight into how the failure to recognise the identities of persons with non-heteronormative SOGIE could prevent them from benefitting from the rights that accrue to all individuals under the ACHPR. This is because legal recognition is often a prerequisite for access to numerous rights, including education and healthcare. Considering *Open Society Justice Initiative v Côte d'Ivoire,* it is argued that the African Commission has already created a framework for understanding legal gender recognition. Ultimately, legal gender recognition will enable persons with non-heteronormative gender identities and gender expressions to live a dignified life.

As mentioned above, the right to human dignity also includes the prohibition of inhuman or degrading treatment or punishment. In *Shumba v Zimbabwe*,[94] the African Commission found that the mistreatment of the complainant prior to and during detention violated Article 5.[95] In voicing its disapproval of the mistreatment of the complainant in detention, the African Commission explained that "[d]isrespect for human dignity cannot serve as the basis for any state action".[96] Thus, although the complainant was suspected of, and charged with, contravention of the Public Order Security Act, which "relates to organising, planning or conspiring to overthrow the government through unconstitutional means", the state still had to ensure that he was treated with respect for his human dignity.[97] Here, it was reiterated that the

[91] Para 140.
[92] Application No 26838/06 (26 June 2012) (Partly concurring, partly dissenting opinion of Judge Vučinić).
[93] Para 141.
[94] (Communication No 288/04) [2017] ACHPR 142 (30 June 2017).
[95] Para 167
[96] Para 137.
[97] Para 10.

prohibition of inhuman or degrading treatment or punishment includes physical or psychological humiliation or suffering.[98]

According to Rudman, discrimination based on non-heteronormative SOGIE forces persons with these orientations, identities, or expressions to denounce an integral part of their existence. This amounts to a clear violation of the right to human dignity guaranteed under the ACHPR.[99] This is problematic given that the African Commission has recognised that human dignity underlies all the rights enshrined under the ACHPR and that ensuring respect for it is key to the individual's enjoyment of the rights to which they are entitled. Furthermore, there exists a clear link between human dignity and the prohibition of discrimination in that respect for human dignity requires non-discrimination and vice versa. In this regard, the statement in *Purohit* is significant. Replacing "disabled persons" with "persons with non-heteronormative SOGIE", or even "any person", illustrates the purpose of human dignity under the ACHPR.

7 3 2 Non-discrimination

7 3 2 1 Defining non-discrimination under Article 2

Articles 2 and 3 form the non-discrimination provisions of the ACHPR. Article 2 provides that:

> "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as … sex … or other status".

Whereas Article 2 enshrines the right to non-discrimination in respect of the enjoyment of the rights and freedoms contained in the ACHPR, Article 3 sets out the right to equality before the law and equal protection of the law.[100] These two provisions are crucial to the enjoyment of all

[98] Para 164. See also, *Lucien Ikili Rashidi v United Republic of Tanzania* (Merits and Reparations) Application No. 009/2015 (28 March 2019) para 88. The African Court restated that Article 5 includes a prohibition on humiliation or suffering. Moreover, it was explained that the prohibition of degrading treatment and the resulting infringement on human dignity is absolute.

[99] A Rudman "The protection against discrimination based on sexual orientation under the African Human Rights System" (2015) *AHRLJ* 15 17.

[100] *Bissangou v Congo* (Communication 253/02) [2006] ACHPR 74 (29 November 2006) ("*Bissangou v Congo*") paras 69-71; R Murray *The African Charter on Human and Peoples' Rights: A Commentary* (2019) 48-51. See also, African Commission, Principles and Guidelines on the Implementation of Economic, Social and Cultural Right in the African Charter on Human and Peoples' Rights (November 2010) ("Principles and Guidelines") para 19. Article 2, like Article 14 of the ECHR, must be invoked with a substantive provision. In comparison, because Article 3 pertains to the equal application of the rights enshrined under the ACHPR to all persons within a state, it is a stand-alone right. In general, the African Commission and African Court apply Article 2 in conjunction with a substantive provision of the ACHPR. However, Murray draws attention to that it has been discussed as a stand-alone right. Nonetheless, considering the wording of Article 2, the position taken here is that it should be read with other rights.

human rights[101] and are mutually reinforcing[102]. Both the African Court and African Commission have confirmed that equality and non-discrimination are fundamental principles of international law. In this regard, reference has been made to the significance of these two principles being guaranteed in the founding international human rights law instruments.[103]

As a point of departure, it should be noted that Articles 2 and 3 require that citizens "be treated in a fair and equitable manner before the law and have the right to enjoy, with no distinction whatsoever, the rights guaranteed by the Charter".[104] More specifically, Article 3 means that individuals should expect fair treatment before the law and have equal access to the rights enshrined under the ACHPR to the same extent as others.[105] Similar to the human rights treaties discussed under chapters 4 to 6, the ACHPR does not define discrimination or distinction. As a result, the African Commission and the African Commission have done so. The elements of these definitions are similar to those under the human rights treaties previously discussed and often draw from the international or regional systems. For example, with reference to Article 26 of the ICCPR, the African Court in *Actions pour la Protection des Droit de l'Homme v Côte d'Ivoire* noted that "equality … presupposes that the law protects everyone without discrimination".[106] Furthermore, drawing from General Comment 18 of the HRC[107], the African Commission in *Zimbabwe Human Rights NGO Forum v Zimbabwe* defined discrimination as:

> "[A]ny distinction, exclusion, restriction or preference which is based on any ground such as [numerous listed grounds] or other status, and which has the purpose or effect of nullifying or

[101] *Zimbabwe Human Rights NGO Forum v Zimbabwe* (Communication 245/02) [2006] ACHPR 73 (25 May 2006) ("*Zimbabwe Human Rights Forum*") para 169.
[102] *Werema v Tanzania* (merits) (2018) 2 AfCLR 520 para 86. See also, *Tanganyika Law Society, the Legal and Human Rights Centre v Tanzania, Application 009/2011; Reverend Christopher R Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34 ("*Tanganyika*"), separate opinion of Ouguergouz J para 35. The African Court describes Articles 2 and 3 as "two sides of the same coin, the first principle being the corollary of the second one".
[103] *Mr Mamboleo M. Itundamilamba v Democratic Republic of Congo* (Communication 302/05) [2013] ACHPR (18 October 2013) ("*Itundamilamba*") para 97. In support of this statement, the African Commission referred to the UDHR, ICCPR, and the ECHR. See also, *Kenneth Good v Republic of Botswana* (Communication 313/05) [2010] ACHPR 106 (26 May 2010) ("*Kenneth Good*") para 218; *Actions pour la Protection des Droit de l'Homme v Côte d'Ivoire* (2016) 1 AfCLR 668 ("*APDH*") para 142-145. Here, the African Court referred to Article 26 of the ICCPR as a more detailed equality and non-discrimination provision.
[104] (Communication 253/02) para 68.
[105] *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (Communication 284/03) [2009] ACHPR 97 (3 April 2009) ("*Associated Newspapers of Zimbabwe*") para 156.
[106] (2016) 1 AfCLR 668 para 146.
[107] See the text to part 4 3 2 1.

> impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms".[108]

From this definition, it is clear that the ACHPR prohibits both direct and indirect discrimination.[109] Because the non-discrimination principle is "essential to the spirit" of the ACHPR, it is necessary to eradicate all forms of it.[110] States should, therefore, refrain from discriminating against individuals or groups in their conduct, policies, and legislation, as well as adopt legislative and other measures to ensure the rights enshrined under the ACHPR without discrimination.[111] This is important because the mere formal recognition of the rights to equality and non-discrimination does not guarantee that it is effective.[112] Moreover, states should provide effective remedies where there has indeed been a violation of the right to non-discrimination because "rights without remedies have little value".[113] As such, Murray argues that special attention must be accorded to vulnerable or marginalised groups.[114] Here, the question of whether "other status" under Article 2 includes non-heteronormative sexual orientations, gender identities or gender expressions becomes relevant.

Similar to the human rights treaties discussed under chapters 4 to 6, Article 2 prohibits discrimination based on numerous listed grounds, including "other status". Thus, the grounds of discrimination provided does not constitute a closed list.[115] In *African Commission on Human and Peoples' Rights v Kenya*, the African Court incorporated indigenous peoples as a prohibited ground of discrimination under the ACHPR, explaining that:

> "The expression 'any other status' under Article 2 encompasses those cases of discrimination, which could not have been foreseen during the adoption of the Charter. In determining whether a ground falls under this category, the Court shall take into account the general spirit of the Charter".[116]

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[108] (Communication 245/02) para 170. See also, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Zimbabwe* (Communication 294/04) para 91; Principles and Guidelines para 19.
[109] (Communication 313/05) para 218.
[110] (Communication 242/01) para 49.
[111] (Communication 245/02) para 171.
[112] *African Commission on Human and Peoples' Rights v Kenya* (merits) (2017) 2 AfCLR 9.
[113] (Communication 245/02) para 171.
[114] Murray (2019) 45.
[115] 77.
[116] Para 138. This was reiterated in Application 018/2018 (15 July 2020) para 73.

According to Vollmer, this suggests that, when considering the expansion of grounds of discrimination under the ACHPR, its general spirit should be taken into account.[117] The ACHPR aims to promote and protect the human rights of all African peoples without discrimination, achieving "freedom, equality, justice, and dignity" for all.[118] However, discrimination and unequal treatment are in direct contradiction with these aims, ultimately preventing individuals to enjoy the rights they are guaranteed under the ACHPR.[119] In light hereof, Vollmer further explains that "where protection is denied to a class of persons, arguably on grounds such as sexual orientation or gender identity, it is inconsistent with the ACHPR".[120] In asserting that non-heteronormative SOGIE are protected under Article 2's "other status", Vollmer draws from Murray and Viljoen's claim that:

> "[T]he grounds that are 'allowed in' as 'other' grounds should be sufficiently serious. If such an approach were to be followed, it is suggested that a 'new' ground should be included if it relates to a human characteristic, which has the impact of impairing human dignity in a manner that is serious and comparable to the impact of the factors already listed".[121]

Framed by this statement, the development of a framework within which discrimination based on non-heteronormative SOGIE is prohibited under the ACHPR is explored in more detail in part 7 3 2 2.

Drawing from the HRC, the ECtHR, and the IACtHR, the African Commission in *Kenneth Good v Republic of Botswana* established the test for determining an Article 2 violation.[122] In terms of this test, a violation occurs where: (i) "equal cases are treated in a different manner"; (ii) there is no "objective and reasonable justification" for the differential treatment; and (iii) there does not exist a proportional relationship between the means and the aim sought to be achieved. Importantly, "[t]hese three benchmarks are cumulative requirements and hence the non-compliance with any of the three requirements makes a treatment discriminatory".[123]

Considering *Kenneth Good* in light of numerous other decisions of the African Commission and the African Court, the test consists of the following steps. First, the complainant should

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[117] Vollmer *Queer families* 238.
[118] Preamble to the ACHPR.
[119] (Communication 211/98) [2001] ACHPR 31 (7 May 2001) para 63. Here, the African Commission cited General Comment 18 of the HRC. See the text to part 4 3 2 1.
[120] Vollmer *Queer families* 240.
[121] R Murray & F Viljoen "Towards non-discrimination on the basis of sexual orientation: the normative basis and procedural possibilities before the ACmHPR and the AU" (2007) 29 *HRQ* 86 92; See also, Vollmer *Queer families* 238.
[122] See the text to parts 4 3 2 1, 5 3 2 1 and 6 4 2 1.
[123] (Communication 313/05) paras 219 and 222.

allege a violation of one or more of the rights enshrined under the ACHPR. For an infringement to be established, complainants should be specific in their allegation and provide sufficient evidence of differential treatment in support of the alleged violation.[124] In this regard, the violation has to be based on one of the prohibited grounds of discrimination under Article 2 or "other status". Second, it should be shown that persons equally situated are treated differently or that persons differently situated are treated the same.[125] To this end, the complainant's treatment should be compared to those in a similar position.[126]

Once differential treatment has been established based on one of the listed grounds or "other status" under Article 2, discrimination is presumed. The burden then shifts to the state to prove that the discrimination was justifiable.[127] Thus, if a distinction can be justified, it will not constitute discrimination.[128] Here, Article 27(2) becomes relevant, providing that the "rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest". Considering the wording of Article 27(2), it is not intended to be used as a limitations clause. However, as illustrated in the discussion below, it has been used as such by the African Commission and the African Court.

Article 27(2) is situated in Chapter II of the ACHPR which sets out individual duties. It is not uncommon for duties to be imposed on individuals under human rights treaties.[129] During the drafting of the ACHPR, Senghor stressed the interconnectedness of traditional African societies, referring to the relationship between the individual's rights and the protection of the family and the community.[130] As such, rights and duties cannot be separated. However, it is important to note that the individual does not owe these duties to the state.[131] Rather, duties

[124] The African Commission and African Court has rejected claims where complainants did not bring sufficient evidence of the alleged violations. See, (Communication 245/02) paras 76 and 172-176; *Dabalorivhuwa Patriotic Front v the Republic of South Africa* (Communication 335/06) [2013] ACHPR 115 (23 April 2013) paras 114-115; *Isiaga v Tanzania* (merits) (2018) 2 AfCLR 218 para 89; (2018) 2 AfCLR 520 paras 76-77.

[125] (Communication 294/04) [2009] ACHPR 98 (3 April 2009) paras 99-100. In this matter, like in *Associated Newspapers of Zimbabwe*, the African Commission also cited the judgement of the US Supreme Court in *Brown v Board of Education of Topeka* 347 US 483 (1954). See also, *Jebra Kambole v Tanzania* Application 018/2018 (15 July 2020) para 87; (Communication 302/05) para 98; (Communication 284/03) para 157.

[126] *Kwoyelo v Uganda* (Communication 431/12) [2018] ACHPR 129 (17 October 2018) para 163.

[127] (Communication 431/12) para 164. See also, (Communication No 211/98) para 67. There is a difference between limitation and justification. Whereas a limitation refers to, for example, a claw-back clause such as Article 27(2), justification applies where it is sought to place "perimeters on the enjoyment of a right".

[128] (merits) (2017) 2 AfCLR 9 para 138. See also, Application 018/2018 (15 July 2020) para 72.

[129] See, Article 29 of the UDHR, Article XXVIII of the ADRDM, Article 32 of the ACHR. See also, Articles 15-16 and 22 of the ACHR.

[130] Viljoen "The African Regional Human Rights System" in *International Protection of Human Rights* 239, discussing Senghor's speech 78 and 80.

[131] For a more detailed exposition of Chapter II of the ACHPR, see Murray (2019) 576-581.

seek to create and strengthen the relationship "among individuals and between individuals and the state".[132]

Although fears have been expressed over the duties imposed under Chapter II and, in particular, its potential to water-down the rights enshrined under Chapter I, the jurisprudence of the African Commission and African Court has illustrated that this fear is yet to be realised.[133] According to the African Commission in *Media Rights Agenda v Nigeria*, Article 27(2) sets out the "only legitimate reasons" for restricting a right enshrined under the ACHPR.[134] Importantly, the African Commission explained that:

> "The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained. Even more important, a limitation may never have as a consequence that the right itself becomes illusory".[135]

A legitimate state interest is determined with reference to whether the limitation is "necessary in a democratic society".[136] Relevant hereto, the African Court in *African Commission v Kenya* explained that the limitation should be "genuinely prompted by the need to protect such common interest".[137] However, a limitation should not be accepted as legitimate without weighing up its "impact, nature and extent … against the legitimate state interest serving a particular goal".[138] Furthermore, if the aim sought to be achieved cannot be identified and justified, the means used cannot be deemed proportional.[139]

The African Commission in *Egyptian Initiative for Personal Rights and INTERIGHTS v Arab Republic of Egypt*[140] drew attention to the importance of considering the situation of victims in determining whether discrimination and unequal treatment is justified. It was alleged that the victims who were demonstrating against an amendment to the Constitution aimed at removing multi-candidate presidential elections were discriminated against based on their sex

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[132] M Mutua "The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties" *VJIL* (1995) 339 368.
[133] Murray (2019) 579; F Ouguergouz *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003) 379.
[134] (2000) AHRLR 200 (ACHPR 1998) para 68. See also, (merits) (2013) 1 AfCLR 34 para 107.2.
[135] Paras 69-70.
[136] (merits) (2013) 1 AfCLR 34 para 106.1.
[137] (merits) (2017) 2 AfCLR 9 para 188.
[138] *Legal Resources Foundation v Zambia* (Communication 211/98) [2001] ACHPR 31 (7 May 2001) para 70. See also, (merits) (2013) 1 AfCLR 34 paras 106.1.
[139] (Communication 313/05) para 224.
[140] (Communication 323/2006) [2011] ACHPR 85 (16 December 2011) ("*EIPR and INTERIGHTS*")

and political opinions.[141] The allegation as to the sex-based discrimination relied on the sexual nature of the violations.[142] In this regard, the African Commission referred to the demeaning language used and the gender-specific sexual harassment directed at the female-demonstrators.[143] Considering that male protesters were not subjected to the same treatment, the African Commission agreed that the women were targeted because they are women.[144] With reference to the HRC and the IACtHR, the African Commission held that the differential treatment cannot be deemed reasonable or legitimate because there was "no reasonable cause behind the discrimination that was inflicted".[145]

Importantly, the African Court in *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* also explained that limitations cannot be used to invalidate human rights and freedoms or to circumvent the obligations that treaties impose on states.[146] Similarly, the African Commission in *Legal Resources Foundation v Zambia* specifically stated that "[j]ustification … cannot be derived solely from popular will, as this cannot be used to limit the responsibilities of state parties in terms of the [ACHPR]".[147] In this context, the margin of appreciation doctrine should also be considered. In *Gareth Anvar Prince v South Africa*[148], the African Commission was tasked with determining whether the criminalisation of the use of cannabis for religious purposes constituted an unreasonable limitation of the complainant's right to freedom of religion.[149] The state argued that the matter had been considered by its highest court, which decided that the "restrictions placed on the use of cannabis do not erode the necessity to ensure religious pluralism, are rational and legitimate and do not invade the right any further than it needs".[150]

In determining whether the state placed an unreasonable limitation on the right to freedom of religion, the African Commission referred to the value of the margin of appreciation doctrine, recognising that the state is often better situated to adopt legislation and policies in line with the needs of its people, bearing in mind the "competing and sometimes conflicting forces that shape its society".[151] The criminalisation of cannabis use in the respondent state is

[141] Paras 2 and 114.
[142] Para 124.
[143] Paras 142-145 and 152.
[144] Paras 137-139.
[145] Paras 146-149.
[146] (merits) (2013) 1 AfCLR 34 para 108. See also, (Communication 335/06) para 117; (Communication 261/02) para 146.
[147] (Communication 211/98) para 70.
[148] (2004) AHRLR 105 (ACHPR 2004).
[149] Para 6.
[150] Para 34.
[151] Para 51. See also, *Jebra Kambole v Tanzania* Application 018/2018 (15 July 2020) para 80.

based on that, as "admitted by the complainant cannabis is an undesirable dependence-producing substance".[152] According to the African Commission, this is a justifiable limitation in terms of Article 27(2).[153] The African Court nonetheless emphasised that it maintains its mandate to ensure that states comply with the human rights standards imposed under the ACHPR and other relevant instruments. Importantly, despite the relevance of the margin of appreciation doctrine, it "cannot be used by States to oust the Court's supervisory jurisdiction" and its "duty to assess if a fair balance has been struck between societal interests and the interests of the individual".[154]

As discussed in chapter 4 to 6 non-heteronormative SOGIE has been established as prohibited grounds of discrimination under the international, European, and inter-American human rights systems because a limitation of rights on this basis could not be justified. In this regard, there is a substantive body of case law, general comments, country reports, and resolutions that set out the rights of persons with non-heteronormative SOGIE. Under the ICCPR and the ECHR, the HRC and the ECtHR have referred extensively to the importance of weighing up individual and societal interests to determine whether a limitation is justifiable. In this regard, the ECtHR, in particular, has made use of the margin of appreciation doctrine. Although this doctrine allows states to determine what constitutes a pressing social need in its specific cultural and societal context, the ECtHR has nonetheless explained that negative attitudes, traditional values, and cultural considerations cannot justify restricting the rights of persons with non-heteronormative SOGIE.[155]

Considering the importance of SOGIE to an individual's ability to live a dignified life, to reach their developmental potential, and to have a sense of belonging, states must present "particularly weighty reasons" to justify a limitation of rights based on non-heteronormative SOGIE. This has was confirmed by the HRC in *Toonen* and *Young*,[156] as well as by the IACtHR in *Atala*, *Freire*, and its advisory opinion on *Gender Identity, and Equality and Non-discrimination of Same-sex Couples*.[157] Importantly, in *Atala*, the IACtHR drew attention to the historical and structural discrimination that sexual minorities have suffered and continue to suffer from, and how an alleged lack of consensus as to the recognition of persons with non-heteronormative SOGIE cannot be accepted as a valid argument for restricting their rights.

[152] Para 43.
[153] Para 43.
[154] Para 81.
[155] See discussion of *Dudgeon*, *Smith and Grady*, *Lustig-Prean, L and V*, *Alekseyev*, and *Taddeuci* in part 5 3 2 2.
[156] See the text to part 4 3 2 2.
[157] See the text to part 6 4 2 2.

The African Commission and the African Court's approach to the limitation of rights is consistent with the international and regional jurisprudence discussed under chapters 4 to 6. The international, European, and inter-American human rights bodies have all rejected common interest and morality as legitimate justifications for the non-recognition of the rights of persons with non-heteronormative SOGIE as this would render the object and purpose of human rights treaties to protect the rights of all persons as illusory. On the African continent, some African states nonetheless perceive SOGIE rights as not constituting human rights.[158] As explained by Vollmer:

> "The firm declaration that SOGI rights are not human rights and that such rights are contrary to African values and traditions gives legitimacy to the notion that homosexuality, and by extension non-heteronormative families, are 'un-African'".[159]

As set out under chapter 2, there exists a perception that non-heteronormative SOGIE was imported with the colonisation of Africa. However, this ignores research that shows the existence and acceptance of non-heteronormative SOGIE in pre-colonial Africa.[160] It also does not take into consideration that the criminalisation of same-sex sexual conduct was a result of colonial influence and that the pledge reiterated in the Preamble of the ACHPR to "eradicate all forms of colonialism from Africa", therefore, supports the decriminalisation and acceptance of non-heteronormative SOGIE.[161] Murray and Viljoen draw attention to the similarity between *Toonen* and the situation in many African countries that criminalise sodomy.[162] As a result, Vollmer argues that the African Court and African Commission will not be able to "accept justifications of the limitation of SOGI rights in Africa on the basis that such laws are necessary to uphold and maintain traditional African morals and values".[163] In light hereof, Rudman's argument that non-discrimination has been recognised as a *jus cogens* norm in *Atala* is significant. This means that limiting a person's rights solely based on their non-heteronormative SOGIE would "constitute an arbitrary deprivation or limitation of that right".[164] Article 27(2) cannot be used to limit the rights of persons with non-heteronormative

[158] See the text to part 7 3 2 2.
[159] Vollmer *Queer families* 262.
[160] See the text to part 2 5 2.
[161] See the text to part 2 5 2. See also, Murray (2019) 594.
[162] Murray & Viljoen (2007) *HRQ* 94.
[163] Vollmer *Queer families* 263.
[164] Rudman (2015) *AHRLJ* 19.

SOGIE because there is no underlying legal justification. As such, "it is impossible to justify arbitrariness with morality or common interest".[165]

Ultimately, the argument that non-heteronormative SOGIE is un-African disregards the ever-changing nature of cultures across time and space and overlooks the diverse cultures, religions, and experiences on the African continent.[166] In this context, the African Commission in *Sudan Human Rights Organisation, Centre on Housing Rights and Evictions v Sudan*[167] explained that "cultural diversity … is a cause for celebration … [and] should not be seen as a source of conflict".[168]

Neither the African Commission nor the African Court has dealt with a limitation based on "morality". However, the references made to African values help to understand the potential meaning of "morality" under Article 27(2). Article 18(3) places an obligation on the state to protect the "moral and traditional values recognised by the community". In this regard, it has been explained that the state should protect *positive* African values. In both the Pretoria Declaration on Economic, Social and Cultural Rights in Africa[169] and the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, positive African values are referred to as those "consistent with international human rights realities and standards".[170] The Working Group on the Rights of Older Persons and Persons with Disabilities in Africa have added that positive African values include those which "inspire and characterize the provision of mutual social and communal care and support".[171]

7 3 2 2 Developing the prohibition of discrimination based on non-heteronormative SOGIE

The protection of the rights of persons with non-heteronormative SOGIE under the ACHPR remains a contentious issue as a result of cultural and political factors. Unlike the instruments discussed under chapters 4 to 6, the jurisprudence of the African Commission and African Court provide limited guidance. Nonetheless, the argument presented here is that, although

[165] 19. See also, Vollmer *Queer families* 264.
[166] See the text to parts 2 5 1 and 2 5 2.
[167] (Communication 279/03, 296/05) [2009] ACHPR 100 (27 May 2009).
[168] Para 221.
[169] (adopted 7 December 2004).
[170] Pretoria Declaration para 9; African Commission "Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights" (2010) para 75.
[171] African Commission "Statement of the Working Group on the Rights of Older Persons and Persons with Disabilities in Africa of the African Commission on Human and Peoples' Rights, on the occasion of the 25th international day of older persons" (1 October 2015) para 5.

haphazard, the rights of persons with non-heteronormative SOGIE are protected under the ACHPR. More specifically, it is argued that the reference in Article 2 to "other status" includes non-heteronormative SOGIE.

As a point of departure, it should be noted that the African Commission has prohibited discrimination based on "other status", showing its willingness to incorporate non-listed grounds.[172] In *Purohit*, the African Commission found a violation of Article 2 as a result of discrimination against disabled persons, as discussed above.[173] Significantly, the African Commission utilised the Vienna Declaration and Programme of Action of 1993 and the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care in support of its inclusion of disability as a prohibited ground of discrimination under the ACHPR.[174] Similarly, in *African Commission v Kenya*, the African Court incorporated indigenous peoples under "other status", drawing attention to the role of the object and purpose of the ACHPR in promoting and protecting human rights when expanding prohibited grounds of discrimination.[175] According to Rudman, this is "important because it shows the possibilities of an analogous ground and the ease with which the Commission accepted this argument, [as well as] its willingness to utilise soft law".[176]

The African Commission first referred to sexual minorities in 2005 in its concluding observation on the periodic report of Cameroon.[177] This came two decades after sexual orientation was declared a prohibited ground of discrimination by the ECHR in *Dudgeon*, but a few years before any mention was made to non-heteronormative SOGIE by the OAS or IACtHR.[178] In its concluding observation on Cameroon, the African Commission expressed concern over "an upsurge of intolerance against sexual minorities".[179] The state was asked to take steps to address these concerns and inform the African Commission of the progress made in its next periodic report.[180] In Cameroon's second periodic report, considered in 2010, the

[172] Rudman (2015) *AHRLJ* 15.
[173] Communication 242/01) para 44. See also, the text to part 7 3 1.
[174] Paras 48 and 54.
[175] See the text to part 7 3 2 1.
[176] Rudman (2015) *AHRLJ* 15-16.
[177] African Commission "Concluding Observations and Recommendations – Cameroon: 1st Periodic Report, 2001-2003" (Adopted at the 39th Ordinary Session, 11-25 May 2005). See also, *Courson v Zimbabwe* (Communication 136/94) [1995] ACHPR 2 (22 March 1995), the first matter submitted to African Commission concerning the criminalisation of same-sex sexual conduct between two consenting male adults. It was argued that this constitutes a violation of various provisions of the ACHPR, including Articles 2, 3, and 5. However, the communication was withdrawn in 1995 before it entered the admissibility stage.
[178] See discussions in chapter 5, part 5 3 2 2; the text to chapter 6, parts 6 3 2 and 6 4 2 2.
[179] African Commission "Concluding Observations – Cameroon: 1st Periodic Report" para 14.
[180] Para 23.

state argued that its condemnation of persons with homosexual sexual orientations did not contravene the UDHR or the ICCPR, and that Article 29[181] of the ACHPR, in fact, protects the moral peculiarities of the state.[182] According to the state:

> "In the current state of African culture, homosexuality does not only appear to be an unaccepted value by the Cameroonian society but is also considered universally as a manifestation of moral decadence that should be fought".[183]

However, the state then continues to discuss the importance of eliminating all forms of discrimination, which requires "tolerance and acceptance of the way of life of others as well as [promoting] understanding and harmonious relations between [peoples]".[184] Although these statements were made in the context of the challenges posed by Cameroon's ethnic and religious diversity, it is ironic that it followed directly after homosexuality, an expression of diverse sexual orientation, was dismissed as mere "moral decadence".[185]

Considering the discussion regarding the limitation of rights under Article 27(2), this is a clear example of where the state's reliance on the values of the Cameroonian people and "popular will" to deny human rights to a portion of the population ultimately renders the rights contained in the ACHPR illusory. Despite recognising that states are better situated to balance the often-conflicting values of their people, it remains obligated to comply with the human rights standards imposed under the ACHPR and other relevant instruments.

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[181] Article 29 places duties on the individual. Sub-article (7) is of particular importance as it requires individuals to "preserve and strengthen positive African cultural values in his relations with other members of society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the moral well-being of society".
[182] African Commission "Cameroon: 2nd Periodic Report, 2003-2005" (Submitted on 26 May 2010, Considered at the 47th Ordinary Session, 12-26 May 2010) paras 94-95.
[183] Para 96.
[184] Paras 98-99.
[185] See, African Commission "Concluding Observations and Recommendations – Cameroon: 2nd Periodic Report: 2003-2005" (Adopted at the 47th Ordinary Session, 12-26 May 2010); African Commission "Cameroon: Third Periodic Report, 2008-2011" (Submitted on 5 November 2013, Considered at the 54th Ordinary Session, 22 October-5 November 2013); African Commission "Cameroon: Third Periodic Report, 2008-2011" (Submitted on 5 November 2013, Considered at the 54th Ordinary Session, 22 October-5 November 2013); African Commission "Concluding Observations and Recommendations – Cameroon: Third Periodic Report, 2008-2011" (Adopted at the 54th Ordinary Session, 22 October-5 November 2013) para xxxvi; African Commission "Cameroon: 4th – 6th Periodic Report, 2015-2019" (Submitted on 3 January 2020, Considered at the 66th Ordinary Session, 13 July-7 August 2020). The African Commission did not address these comments in its concluding observations following the second periodic report. As a result, Cameroon also did not refer to sexual minorities in its third periodic report, considered in 2013. In its concluding observations on the third periodic report, the African Commission again took up the issue of the mistreatment of sexual minorities. In its fourth to sixth periodic report, submitted as one report in 2019, no mention was made of sexual minorities. No concluding observations and recommendations have been made in respect of this most recent report.

Since its 2005 expression of concern regarding the treatment of sexual minorities in Cameroon, the African Commission has also twice referred to sexual orientation as a prohibited ground of discrimination under Article 2 in its communications.[186] Although these were *obiter* statements, Garrido nonetheless argues that it constitutes an explicit recognition that people suffer unequal treatment and discrimination as a result of their non-heteronormative sexual orientation.[187] In 2010, the African Commission published its Principles and Guidelines. These are meaningful because at the time of its publication there had only been one direct reference to non-heteronormative SOGIE – in the concluding observation of Cameroon in 2005 – and two *obiter* statements in decisions of the African Commission.

In discussing the obligations on states to ensure economic, social, and cultural rights, the African Commission lists sexual orientation as a prohibited ground of discrimination.[188] Persons with non-heteronormative SOGIE are further included as vulnerable and disadvantaged groups "who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights".[189] States, therefore, have a heightened obligation to ensure that vulnerable and disadvantaged groups enjoy their rights on par with other persons. To this end, it should adopt special measures aimed at ensuring substantive quality, as well as "reduc[ing] or suppress[ing] conditions that perpetuate discrimination" against these groups.[190] Moreover, states should take steps to "recognise and … combat intersectional discrimination".[191]

The most significant step taken to protect the rights of persons with non-heteronormative SOGIE by the African Commission was in 2014 with the adoption of Resolution 275, focusing exclusively on protecting these persons against violence and other human rights violations.[192] Considering Articles 2 to 5 of the ACHPR, the African Commission expressed concern over the violence committed against persons based on their real or imputed non-heteronormative SOGIE, as well as against human rights defenders and organisations that seek to protect them. Against this backdrop, the African Commission urged states to end all forms of violence against persons based on their real or imputed non-heteronormative SOGIE and to ensure that human

[186] (Communication 245/02) para 169; (Communication 284/03) para 155.
[187] R Garrido "Patterns of discrimination based on sexual orientation in Africa: is there a Lusophone exception?" (2019) 3 *AHRLY* 93 104. See also, Murray (2019) 66.
[188] African Commission "Principles and Guidelines" para 1(d).
[189] Para 1(e).
[190] Paras 34 and 38.
[191] Paras 34 and 38.
[192] African Commission "Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity" (Adopted at the 55th Ordinary Session, 28 April-12 May 2014).

rights defenders can carry out their human rights protection activities "in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities".[193] To this end, states should enact legislation aimed at protecting the rights of persons with non-heteronormative SOGIE and investigate human rights violations against them.[194] According to Rudman, the adoption of this resolution "shows that the Commission has accepted that violence on the basis of sexual orientation amounts to discrimination and violates the rights to equality, integrity and dignity".[195] However, it "does not mean that the Commission has accepted non-discrimination based on sexual orientation".[196]

In comparison with the resolutions adopted by the Human Rights Council[197] which incorporates provisions from the ICCPR, ICESCR, and CEDAW, Resolution 275 does not refer to the other instruments adopted under the auspices of the AU. Moreover, the resolutions of the Human Rights Council go beyond an expression of concern over the human rights violations perpetrated against persons based on their non-heteronormative SOGIE and making general recommendations. In this way, the Human Rights Council has illustrated a broader commitment to investigating the nature and the extent of the violence suffered by persons based on their non-heteronormative SOGIE and formulate its responses accordingly.[198] This includes the establishment of an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. However, during the voting on the resolution, the Nigerian delegation objected against the establishment of the Independent Expert, stating that the decision on whether or not to recognise the rights of persons with non-heteronormative SOGIE "fall within the purview of each individual State in accordance with the principle of national sovereignty".[199] It was further argued that non-heteronormative SOGIE rights "has not been recognized by the vast majority of legal systems as part of the international human rights structure" and that, as a result, establishing an Independent Expert would contravene "principles such as cooperation and respect for each other's cultural and religious

[193] Para 3.
[194] Para 4.
[195] Rudman (2015) *AHRLJ* 23-24.
[196] 24.
[197] See the text to part 4 2 3.
[198] See the text to parts 4 2 3, 4 3 2 2, 5 4 2, and 6 3 2. The resolutions of the UN followed well after the HRC's establishment of non-heteronormative SOGIE as a prohibited ground of discrimination under the ICCPR. Resolution 275 is also similarly phrased to those adopted by the CoE and the OASGA, signalling that it is not strange for regional resolutions of this kind to be less far-reaching than those adopted under the UN.
[199] ARC International and ILGA "Compilation of the adoption of the 2016 SOGI Resolution" (30 June 2016) <https://ilga.org/downloads/SOGI_Resolution_Vote_compilation.pdf> (accessed 22-09-2020) 2.10.

particularities".[200] However, Rudman argues that this contradicts the international and regional jurisprudence that provides explicit recognition of the rights of persons with non-heteronormative SOGIE.[201]

Considering the discussion under chapter 3, regarding cultural relativism and universal human rights, the opposition to the resolution based on the argument that it does not represent universally agreed-upon values does not hold to a universalist conception of human rights.[202] This is because human rights are not founded on global values. Rather, at its core is the recognition of the inherent dignity of the human being which warrants protection from all forms of violence and discrimination, in order to allow persons, whether as individuals or in groups, to reach their full potential and contribute to their societies. Thus, as Rudman explains, "[a]s a basic principle, universality does not consider differences but simply humanity".[203]

Shortly before the adoption of Resolution 275, the Special Rapporteur on Human Rights Defenders expressed her disapproval of the violence against and intimidation of persons with non-heteronormative SOGIE in Uganda, encouraged by the promulgation of the Anti-Homosexuality Act.[204] She also stated her concern over the implications of this legislation for the human rights defenders who protects "sexual minorities who are already vulnerable as a result of social prejudice".[205] Against this backdrop, similar recommendations were made to the Ugandan state as the African Commission made in Resolution 275. Importantly, the Special Rapporteur called on the Ugandan state to "maintain an atmosphere of tolerance towards sexual minorities in the country" and encouraged "political authorities to continue dialogue on this sensitive issue of homosexuality in Africa".[206]

Since the adoption of Resolution 275, the African Commission has increasingly incorporated recommendations on the rights of persons with non-heteronormative SOGIE under the ACHPR. In this regard, concern has been expressed over the criminalisation of

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[200] 2.10.
[201] A Rudman "The Value of the Persistent Objector Doctrine in International Human Rights Law" (2019) 22 *PER / PELJ* 1 22-23.
[202] ARC International and ILGA "Compilation of the adoption of the 2016 SOGI Resolution" (30 June 2016) 5.2.26.
[203] Rudman (2019) *PER / PELJ* 8.
[204] African Commission "Press Release on the implications of the anti-homosexuality Act on the work of Human Rights Defenders in the Republic of Uganda" African Commission (10-03-2014) *ACHPR* <https://www.achpr.org/pressrelease/detail?id=228> (accessed 27-08-2020).
[205] African Commission "Press Release on the implications of the anti-homosexuality Act on the work of Human Rights Defenders in the Republic of Uganda" African Commission.
[206] African Commission "Press Release on the implications of the anti-homosexuality Act on the work of Human Rights Defenders in the Republic of Uganda" African Commission.

consensual same-sex sexual conduct in Liberia.[207] The African Commission has also drawn attention to how discrimination against and marginalisation of persons with non-heteronormative SOGIE in Namibia limits their access to healthcare, enshrined under Article 16.[208] No subsequent periodic reports have been submitted by Liberia and Namibia. It is, therefore, unclear whether the states involved have addressed the concerns expressed and complied with the recommendations made.

The African Commission has further commended the steps taken by the Malawian state to investigate allegations of discrimination against sexual minorities preventing their right to health care access.[209] In response to South Africa's second periodic report, the African Commission lauded the existence of legislation that prohibits discrimination based on numerous grounds, including based on sex, gender, and sexual orientation.[210] However, it nonetheless expressed concern over the continuing "discrimination, homophobia, and prejudice against homosexuals resulting in murder and violence against [them] despite the existence of legal frameworks" and the failure to list "corrective rape as a sexual offence".[211]

Besides the references made to persons with non-heteronormative SOGIE in concluding observations, the African Commission has also included these persons as those entitled to protection in terms of General Comment 4 on the right to redress for victims of torture and other cruel, inhuman, or degrading punishment or treatment[212] and the Guidelines on combating sexual violence and its consequences in Africa.[213]

General Comment 4 includes a non-exhaustive list of prohibited grounds of discrimination, but also specifically lists sexual orientation and gender identity.[214] In this comment, the African Commission explains that certain groups have a heightened risk of ill-treatment because of discrimination and marginalisation, presenting "systemic barriers to accessing justice".[215]

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[207] African Commission "Concluding Observations and Recommendations – Liberia: Initial and Combined Periodic Reports, 1982-2012" (Adopted at the 17th Extraordinary Session, 19-28 February 2015) para 17.
[208] African Commission "Concluding Observations and Recommendations – Namibia: 6th Periodic Report, 2011-2014" (Adopted at the 20th Extraordinary Session. 9-18 June 2016) para 32.
[209] African Commission "Concluding Observations and Recommendations – Malawi: Initial & Combined Periodic Reports, 1995-2013" (Adopted at the 57th Ordinary Session, 4-18 November 2015) para 28.
[210] African Commission "Concluding Observations and Recommendations – South Africa: 2nd Periodic Report, 2003-2014" (Adopted at 20th Extraordinary Session 9-18 June 2016) para 12.
[211] Paras 32-33.
[212] African Commission "General Comment 4 on the African Charter on Human and Peoples' Rights: the right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment (Article 5)" (Adopted, 4 March 2017).
[213] African Commission "The Guidelines on Combating Sexual Violence and its Consequences in Africa" (Adopted, 5 November 2017).
[214] Para 20.
[215] Para 14.

However, all persons are nonetheless entitled to redress without discrimination for harm suffered including sexual and gender-based violence.[216] Importantly, it is stated that any person can be a victim of this type of violence, including persons with non-heteronormative SOGIE.[217] The African Commission explained that violence against these persons should receive equal attention, with the violence having to be "adequately and effectively addressed".[218]

The Guidelines on combating sexual violence outlines member states' obligations in preventing and addressing sexual violence, defined as "any non-consensual sexual act", including corrective rape, the use of rape to "cure" women of their non-heteronormative sexual orientation.[219] The harm suffered does not have to be physical but can be psychological.[220] Similar to General Comment 4, it is recognised that non-heteronormative SOGIE can increase the risk of sexual violence.[221]

In these Guidelines, the African Commission explains that the right to non-discrimination requires states to adopt measures that guarantee the rights of victims of sexual violence, regardless of their age, sexual orientation, and gender expressions, amongst others.[222] Besides investigating these crimes and providing effective remedies to victims, states should also adopt legislative or other measures to prevent sexual violence by addressing its causes, including:

> "[S]exist and homophobic discrimination, patriarchal preconceptions and stereotypes about women and girls … [or] based on gender identity, real or perceived sexual orientation … or certain preconceptions of masculinity and virility".[223]

This is because sexual violence leads to social exclusion and stigmatisation. In the case of children, this often means that education is abandoned.[224] The approach adopted supports a constructionist perception of sex, gender, and sexual orientation and presents a queer theoretical understanding of the impact of heteronormativity on the enjoyment of certain rights, as well as how to prevent violations.

It is further significant that the African Commission illustrates a broad understanding of gender, acknowledging the societal expectations placed on men and women based on their sex.

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[216] Para 16.
[217] Para 59.
[218] Para 59.
[219] African Commission "Guidelines on Combating Sexual Violence" paras 3.1(a)-(b).
[220] Para 3.2(a).
[221] Para 3.2(e).
[222] Para 4.
[223] Para 7.
[224] Para 3.3.

It is explained that gender identity is a personal perception that can differ from the gender assigned at birth. Gender expression, in comparison, concerns how an individual externalises their personal experience of their gender through, for example, wearing the clothing or using the body language and tone of voice that is attributed to a specific gender. The African Commission also indicated that "[g]ender identity and gender expression are not necessarily related".[225]

In 2016, the African Commission published the Joint Dialogue on Ending Violence and Other Human Rights Violations Based on Sexual Orientation and Gender Identity with the IACmHR and the UN. The value of the Joint Dialogue lies in, first, setting out terms related to non-heteronormative SOGIE.[226] These definitions are similar to those set out under the YP and the YP+10. Second, the Joint Dialogue confirms that existing international and regional human rights standards apply equally to persons with non-heteronormative SOGIE as to persons with heteronormative SOGIE.[227] Significantly, the African Commission, the IACmHR, and the UN highlighted "human dignity and personhood, universality, non-discrimination, and equality before the law [as] common foundational and crosscutting principles in all three systems".[228] Considering this statement in light of the jurisprudence discussed under the international and inter-American treaties, there is clear support for the protection of the rights of persons with non-heteronormative SOGIE by the African Commission.[229] The Joint Dialogue is further significant for facilitating the sharing of information and experiences across the international, African, and inter-American human rights systems. Through this, the Joint Dialogue encourages the adoption of the international best practice in protecting the rights of persons with non-heteronormative SOGIE.[230]

Importantly, in 2016, the African Commission made a joint statement with human rights experts calling for an end to the pathologisation of persons with non-heteronormative SOGIE.[231] Attention was drawn to the impact of pathologisation on various rights, including the rights to health and education as a result of persons with non-heteronormative SOGIE often

[225] Para 3.2(d).
[226] African Commission, IACmHR, UN (2016) 1-2.
[227] Paras 12-16.
[228] Para 15.
[229] See the text to parts 4 2 3, 4 3 2, 4 4 2, 4 5 3, 4 6 3, 6 3 2, and 6 4 2.
[230] See, in general, paras 21-37.
[231] OHCHR "Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness" (17-05-2016) *OHCHR* <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E> (accessed 24-08-2020).

being subjected to harmful medical practices against their will, as well as the societal exclusion that arises from their marginalisation.

The experts explained that non-heteronormative SOGIE are "part of the rich diversity of human nature".[232] It is, therefore, necessary to de-pathologise medical classifications and to reform policies and legislation to protect persons with non-heteronormative SOGIE. Furthermore, states should ensure that health services are provided to persons with non-heteronormative SOGIE without marginalisation, discrimination or pathologisation and that gender-affirming treatment be made available to persons wishing to receive it.[233] Considering the African Commission's outspoken statements on the protection of the rights of persons with non-heteronormative SOGIE, it is surprising that it has not referenced the YP or the YP+10 since its adoption in 2007.

A few months after the joint statement was published, the African Group criticised the adoption of Resolution 32/2 by the Human Rights Council because it interferes in "matters which fall within the domestic jurisdiction of States".[234] The African Group argued that this infringes on state sovereignty and the principle of non-intervention.[235] It also resisted the notion that non-heteronormative SOGIE can be "linked to existing international human rights instruments" as there is "no legal foundation [for this] in any international human rights instrument".[236] According to the African Group:

> "[T]he attempts to focus on certain persons on the grounds of their sexual interests and behaviours, while ignoring that intolerance and discrimination regrettably exist in various parts of the worlds … undermine not only the intent of the drafters and signatories to various human rights instruments, but also seriously jeopardize the entire international human rights framework as they create divisions".[237]

Against this backdrop, the tension between the African Commission's work towards the protection of the rights of non-heteronormative SOGIE and the push-back from African states, in general, becomes relevant. Despite the progress made, non-heteronormative SOGIE remains

[232] OHCHR "Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness" *OHCHR*.
[233] OHCHR "Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness" *OHCHR*.
[234] Africa Group "Statement of the African Group on the presentation of the annual report of the United Nations Human Rights Council" (4 November 2016) para 12. See 4 2 3. See also, AU "Permanent observer mission of the African Union to the United Nations" (2020) *AU* <https://www.africanunion-un.org/history-of-the-mission> (accessed 7-12-2020). The Africa Group consists of representatives from the 54 AU member states. The Africa Group consider "UN resolutions and topics so a common African position can be reached".
[235] Para 12.
[236] Para 9.
[237] Para 9.

a contentious issue on the African continent.[238] There has been increasing backlash against the African Commission's statements in support of protecting the rights of persons with non-heteronormative SOGIE under the African regional human rights instruments.

Despite the rising tension, the African Commission, the IACmHR, and the UN adopted a follow-up Joint Thematic Dialogue on Sexual Orientation, Gender Identity and Intersex Related Issues in 2018.[239] The second Joint Thematic Dialogue builds on the Joint Dialogue, with its most important contribution being that of the inclusion of discrimination based on sex characteristics.[240] The second Joint Thematic Dialogue drew particular attention to the socio-economic difficulties that persons with non-heteronormative SOGIE face, including the denial of education to children based on their "perceived sexual orientation or gender identity".[241] In its discussion of the African human rights system, the African Commission, the IACmHR, and the UN confirmed that the rights enshrined under the ACHPR accrue to all persons without distinction.[242] Moreover, considering the broad and open-ended non-discrimination provision enshrined under Article 2, it was put forth that:

> "The logic of the Charter – a holistic reading, informed by its object and purpose – also demands that non-discrimination be understood broadly, because exclusion from the ambit of Article 2 would have the far-reaching effect of foreclosing reliance on all other Charter rights. It is, quite obviously, unthinkable that an African lesbian woman may – for example – not invoke the right not to be tortured or the right to a fair trial before the African Commission (or the African Human Rights Court) just because of her sexual orientation".[243]

This statement is significant because it supports a teleological interpretation of the rights enshrined under the ACHPR and reflects a universalist perception of human rights that does not allow the limitation of rights where it would render those rights illusory.[244] In this regard, the African Commission, the IACmHR, and the UN also consider two potential grounds for limiting the rights of persons with non-heteronormative SOGIE, namely African values and majority morality. The Joint Thematic Dialogue confirm that there is no credible evidence that

[238] See the text to part 2 5 2.
[239] African Commission, IACmHR, UN "Joint Thematic Dialogue on Sexual Orientation, Gender Identity and Intersex Related Issues" (2018).
[240] 3.
[241] 11.
[242] 30.
[243] 31.
[244] 35.

non-heteronormative SOGIE are indeed un-African and that majority morality or public opinion cannot justify the limitation of restricting fundamental human rights.[245]

One of the greatest pushbacks involve removing CAL from the list of NGOs with observer status before the African Commission. Although CAL was granted observer status in 2015[246], the African Commission revoked this shortly after the publication of the second Joint Thematic Dialogue in 2018 as a result of pressure from the AU's Executive Council.[247] According to the Executive Council, CAL did not represent "fundamental African values, identity and good traditions".[248] Furthermore, it argued that CAL "may attempt to impose values contrary to the African values".[249] Before their observer status was revoked, CAL requested an advisory opinion from the African Court on the "extent to which the African Union political organs may direct the Commission to adopt a particular interpretation of the African Charter".[250] However, the African Court dismissed the request, stating that CAL, despite being an African organisation in terms of Article 4(1), is not recognised by the AU. As a result, CAL lacked standing.[251] According to Murray:

> "[T]his sequence of events illustrates the highly sensitive nature of the debate on the continent, the lack of consensus among the Commissioners themselves as to their position on the issue, and the willingness of the AU to interfere in the independence of the African Commission".[252]

With the removal of CAL's observer status and a clear step back from the AU in respect of recognising the rights of persons with non-heteronormative SOGIE, it remains to be seen whether the African Commission will, in its upcoming sessions, continue its trend of expressing concern over the criminalisation of non-heteronormative SOGIE or the impact of discrimination and stigmatisation on the rights of these individuals, and recommend the adoption or adaption of legislation and policies.[253]

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[245] 36-37.
[246] African Commission "Final Communiqué of the 56th Ordinary Session of the African Commission on Human and Peoples Rights" (21 April-7 May 2015) para 25.
[247] African Commission "Final Communiqué of the 24th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights" (30 July 30-8 August 2018) para 8.
[248] African Commission "Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights" (7-12 June 2015) EX.CL/Dec.887 (XXVII) para 7.
[249] Para 7.
[250] *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and the Coalition of African Lesbians*, Application 002/2015 (2017) 2 AfCLR 606. See also, Murray (2019) 70.
[251] Para 57.
[252] Murray (2019) 70.
[253] See, Although the African Commission has considered country reports by Angola, Benin, Cameroon, Chad, Congo, Egypt, Gambia, Lesotho, Malawi, Nigeria, Togo, Zimbabwe no concluding observations have been adopted during 2019/2020 that mention anything SOGIE related.

7 3 3 Education

7 3 3 1 Socio-economic rights interpretation

The social, economic, and cultural rights guaranteed under the ACHPR are phrased in vague and general terms.[254] For example, Article 17(1) provides that "[e]very individual shall have the right to education" without expanding on its content or aims. As a result, "innovative interpretation" is required to enable states to fulfil these rights.[255]

Prior to 2000, the African Commission found violations of economic, social, and cultural rights without exploring the meaning of these rights or drawing from international human rights law.[256] The jurisprudence is still significant for establishing that the economic, social, and cultural rights guaranteed under the ACHPR are justiciable and that Article 1 obligates states to respect, protect, promote and fulfil these rights just like it has to civil and political rights.[257] Ssenjonyo explains that this was the position because of the African Commission's lack of expertise and "little concrete international jurisprudence".[258] Furthermore, few complaints concerning social, economic, and cultural rights were submitted to it.[259]

After 2000 there was a clear shift towards developing the normative content of these rights. This was a result of a combination of factors, being the willingness of Commissioners to articulate the reasons for their decisions, the increase in socio-economic complaints brought, the adoption of the Constitutive Act of the AU which "placed more emphasis on the promotion and protection of human rights", and the development of the social, economic, and cultural rights at the international level, particularly by the CESCR.[260] Against this backdrop, the African Commission started to increasingly rely on international jurisprudence. For example, in *SERAC*, the African Commission drew from the ICESCR in interpreting the right to health

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[254] M Ssenyonjo "The Protection of Economic, Social and Cultural Rights under the African Charter" in D M Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 91 91. See also, M Ssenyonjo "Economic, social and cultural rights in the African Charter" in M Ssenyonjo (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (2012) 55 58; M Ssenyonjo "Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 years since the adoption of the African Charter" (2011) 29 *NQHR* 358 362.

[255] Ssenyonjo "ESCR in the African Charter" in *The African Regional Human Rights System* 58.

[256] 58, 62, and 68.

[257] 67-68.

[258] 68-69.

[259] 69.

[260] Ssenyonjo "ESCR in the African Charter" in *The African Regional Human Rights System* 79-80. See also, Ssenyonjo "The Protection of ESCR under the African Charter" in *The Protection of ESCR in Africa* 98.

and the right to a clean environment.[261] Similarly, in *Centre on Housing Rights and Evictions v Sudan*, reference was made to General Comment 14 of the CESCR on the right to health.[262]

The ACHPR imposes identical obligations on states to realise economic, social, and cultural rights as it does civil and political rights, meaning the same enforcement mechanisms apply in respect of both sets of rights.[263] This is unlike the ACHR where there have been inconsistencies in the interpretation of the obligations imposed under Parts II and III respectively.[264] As stated above, Article 1 of the ACHPR imposes an obligation on states to respect, protect, promote, and fulfil all the rights enshrined therein.

Because there are no limitations that apply to state obligations in respect of ensuring social, economic, and cultural rights besides those provided under Article 27(2)[265], Chirwa asks whether these rights are then immediately realisable.[266] Considering the African Commission's decision in *Purohit*, it is clear that states should take concrete and targeted steps within their available resources to ensure the full realisation of socio-economic rights without discrimination.[267] With regard to the meaning of "within its available resources", a lack of resources is a valid defence for the state's failure to immediately realise socio-economic rights. However, Chirwa argues that in terms of General Comment 3 of the CESCR, states should nonetheless illustrate the optimal use of its available resources to meet basic needs.[268]

In light of Chirwa's statement, the progressive realisation of socio-economic rights becomes relevant. This requires states to revisit the measures adopted to ensure that it remains in line with its most efficient use of its available resources, gearing it towards the full realisation of socio-economic rights.[269] Despite the obligation of progressive realisation, states nonetheless have to provide for a minimum core in respect of each socio-economic right regardless of potential resource constraints.[270] The African Commission's Principles and Guidelines sets out

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[261] (Communication No 155/96) paras 52-53.
[262] Communication 279/03, 296/05) [2009] ACHPR 100 (27 May 2009) paras 209-210.
[263] Chirwa "African Regional Human Rights System" in *Social Rights Jurisprudence* 323. See also, Ssenyonjo "The Protection of ESCR under the African Charter" in *The Protection of ESCR in Africa* 91.
[264] See the text to part 6 4 3 1.
[265] Article 14 of the ACHPR is an exception. Although the right to property is guaranteed, it may "be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".
[266] Chirwa "African Regional Human Rights System" in *Social Rights Jurisprudence* 326.
[267] (Communication No 242/01) [2003] ACHPR 49 (29 May 2003) para 84. See also, Ssenyonjo "The Protection of ESCR under the African Charter" in *The Protection of ESCR in Africa* 107.
[268] Chirwa "African Regional Human Rights System" in *Social Rights Jurisprudence* 327.
[269] (Communication No 155/96) [2001] ACHPR 34 (27 October 2001) para 52. See also, African Commission "Principles and Guidelines" para 13; Ssenyonjo "ESCR in the African Charter" in *The African Regional Human Rights System* 83.
[270] African Commission "Principles and Guidelines" para 17.

the applicable minimum core obligations. This is explored in more detail below with a focus on the right to education. Despite the existence of minimum core obligations, the realisation of socio-economic rights on the African continent remains hampered by poverty.[271] Ultimately, the potential meaningfulness of socio-economic rights depends on their effective implementation.[272]

7 3 3 2 Defining education under Article 17(1)

Article 17 enshrines the right to education, the right to participate in cultural life[273], as well as the "promotion and protection of morals and traditional values". [274] Despite this, education has nonetheless developed as a right independent to culture, morals, and traditional values.[275] The M'Baye Draft enshrined a much more detailed right to education under draft Article 12 than the general right to education provided for under Article 17(1). Draft Article 12 contained elements of Article 26 of the UDHR, Article 13 of the ICESCR, and Articles 28 and 29 of the CRC.[276] It included the aims of education and state obligations in respect of the different levels of education, and also enshrined the right of parents or legal guardians to have their children receive an education in line with their moral and religious values. Murray explains that considering the focus of the right to education in the M'Baye Draft, it is unclear why the right to education was diluted to what now appears in the ACHPR.[277]

The wording of the right to education under the European and inter-American human rights treaties contain aspects similar to the international instruments discussed under chapter 4. However, each provision guarantees the right to education in a unique manner. Nonetheless, the ECtHR and the IACtHR have drawn extensively from the ICESCR and the CRC in their interpretation of the right to education under the ECHR and the ACHR. This can also be seen in relation to the ESC and the ESC(r), albeit to a lesser extent.

Although Article 17(1) lacks detail, the African Commission has given the same meaning to the right to education as under international and regional human rights law. The Principles and Guidelines provide the most significant guidance on the interpretation of the right to

[271] See DM Chirwa & L Chenwi "The protection of economic, social and cultural rights in Africa" in DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 3, 12-16.
[272] Amin *A teleological approach to the interpretation of socio-economic rights* 20.
[273] Article 17(2) of the ACHPR.
[274] Article 17(3).
[275] Murray (2019) 437.
[276] See the text to parts 4 2 4, 4 4 3, and 4 6 4.
[277] Murray (2019) 438.

education under the ACHPR, giving substance to the statements made in the African Commission's resolutions. As a point of departure, it should be noted that states have the obligation to ensure that socio-economic rights are available, adequate, accessible, and acceptable. This is in line with the 4-A scheme adopted by the Human Rights Council, the CESCR, the CEDAW Committee, and the CRC Committee.[278] The Principles and Guidelines also give the same meaning to the scheme under the ACHPR.[279]

According to the African Commission, the right to education includes all levels of education.[280] Whereas, primary education must be "free and compulsory", states only have to provide for all other levels of education.[281] In this regard, states should ensure "equal opportunity and general accessibility, both physical and economic, for all persons to education without discrimination".[282] Because education is "a fundamental right that affects the growth, development and welfare of human beings", it should be aimed at:[283]

> "[T]he promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential, without discrimination; … fostering respect for human rights and fundamental freedoms [and]… the preparation of the child for responsible life in a free society, in the spirit of understanding, equality, tolerance, dialogue, mutual respect and friendship among all peoples".[284]

These aims are almost identical to those provided under the UDHR, the ICESCR and the CRC.[285] Given the limited guidance from the African Commission and the lack of jurisprudence from the African Court regarding the interpretation of Article 17(1), inspiration can be drawn from these instruments, in particular, the CRC.

Considering the developmental aim of education, states should ensure that learners are taught in an enabling and safe school environment.[286] To this end, corporal punishment should

[278] See the text to parts 4 2 4 1, 4 4 3, 4 5 3, and 4 6 4 1.
[279] African Commission "Principles and Guidelines" para 3.
[280] African Commission "Principles and Guidelines" para 69.
[281] African Commission "Resolution on the Right to Education in Africa" (Adopted at the 58th ordinary session, 6-20 April 2016) para 12(i).
[282] African Commission "Resolution on the Right to Education in Africa" para 12(i). See also, African Commission "Concluding Observations: Mauritius (8-22 May 2017) para 42; African Commission "Concluding Observations: Gabon" (7-12 March 2014) para 15; African Commission "Concluding Observations: Botswana" (12-26 May 2010) paras 15, 46, and 67; African Commission "Mission Report: Lesotho" (2006) para 109; African Commission "Mission report: Benin (7-11 August 2000) paras 15 and 41.
[283] African Commission "Principles and Guidelines" para 69.
[284] Para 71(f)(1)-(2) and (4).
[285] See the text to parts 4 2 4 2, 4 4 3 1, and 4 6 4 2.
[286] African Commission "Resolution on the Right to Education in Africa" para 12(i).

be prohibited because it infringes on their right to not be subjected to harmful treatment, as well as their inherent dignity.[287] This has been confirmed by the CRC Committee, requiring that non-violent forms of discipline be adopted at schools.[288] Both the OHCHR and the CRC Committee have also established that bullying in schools infringes on the ability of learners to benefit fully from education.[289]

In the Guidelines on Combatting Sexual Violence and its Consequences in Africa, the African Commission drew attention to the importance of sexual health education at all levels for protecting children from sexual violence. Sexual health education should cover sexual and reproductive health, but also "all forms of sexual violence, its causes and consequences". In this regard, education should "challenge gender and sexist stereotypes".[290] This illustrates that the African Commission is open to a constructionist understanding of sex and gender that unpacks and addresses the harmful effects of the conflation of sex, gender, and sexual orientation.[291]

The developmental aim of education also requires that states take steps to ensure that children from vulnerable and marginalised groups have equal access to education.[292] To this end, states have to ensure that the curriculum and the school environment is inclusive of, and appropriate, to these groups.[293] Against the backdrop of the research discussed under 1 1, it is clear that children with non-heteronormative SOGIE are vulnerable to discrimination and marginalisation in the context of education. Thus, the obligation on states should apply in this context as well.

Fostering respect for human rights and preparing children for a responsible life in a free society supports the inclusion of human rights education at all levels of education. According to the African Commission, Article 17(1) read with Article 25[294] also requires this.[295] Importantly, in its Resolution on Human Rights Education, the African Commission

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[287] African Commission "Principles and Guidelines" para 71(q). See, African Commission "Concluding Observations: Botswana" (16-30 July 2019) para 74(i); African Commission "Concluding Observations: Mauritius" (8-22 May 2017) para 46. See also, the text to parts 4 6 4, 4 6 4 1, 5 3 3, 5 4 3, 5 5 1, 6 3 1, 6 3 3, 6 4 1, and 6 4 3 2.

[288] See the text to part 4 6 1.

[289] See the text to parts 4 3 4 1, 4 6 4 1.

[290] African Commission "Guidelines on combating sexual violence and its consequences in Africa" (2017) 21.

[291] See the text to parts 2 2 2 and 2 3 1.

[292] African Commission "Resolution on the Right to Education in Africa" para 8.

[293] Para 12(i).

[294] Article 25 provides that states are obligated "to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood".

[295] African Commission "Resolution on Human Rights Education" (Adopted at the 14th ordinary session, 1-10 December 1993) ACHPR/Res.6(XIV)93 para 2: "Bearing".

acknowledged that human rights education "is a prerequisite for the effective implementation of the [ACHPR] and other international human rights instruments".[296] It was further recognised that education is an important medium through which the "values and corresponding behaviours in a civil society based on full respect for human and peoples' rights, democracy, tolerance and justice" can be instilled.[297] As a result, the African Commission requested that states include human rights education at all school levels, underlying the importance of ensuring that education is inclusive of vulnerable and disadvantaged groups.[298]

The ACHPR contains two unique aspects related to the right to education. First, that education should be directed towards the "preservation and strengthening of positive African morals, traditional values and cultures".[299] Second, that education should promote "African unity and solidarity".[300] Related hereto, and similar to the UDHR, CESCR, CRC, and the ECHR, states also have to respect the freedom parents or guardians to have their children's education conform to their religious and moral convictions.[301] Parents or guardians' religious and moral convictions can sometimes conflict with the broader aims of education, as well as an inclusive human rights curriculum. Despite this, it is argued that the freedom of parents or guardians is only one of a range of aims of education.[302] As a result, it cannot outweigh, for example, the importance of the child's development or the value of human rights education, seeking to promote non-discrimination and mutual respect among all. In support of this argument, the African Commission has also explained that, although Article 17(2) and (3) provides the right to participate in cultural activities and requires the state to promote and protect the "morals and traditional values" of its communities, it is nonetheless obligated to:

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[296] Para 1: "Acknowledging".
[297] Para 7: "Recognising". See also, Murray (2019) 439.
[298] Paras 1 and 3. See also, African Commission "Concluding Observations: Burkina Faso (23 Feb-4 March 2017) paras 24(ii), 30(iii) and 31(ii); African Commission "Concluding Observations: Sierra Leone" (16-25 Feb 2016) paras 71 and 87(xxv); African Commission "Concluding Observations: Cameroon" (7-14 March 2014) para v(xii); African Commission "Concluding Observations: Ethiopia" (12-26 May 2010) para 12; African Commission "Mission Report: Lesotho" (2006) para 183. In these concluding observations, the African Commission has expressed concern over the slow introduction to human rights education in certain African states, recommending that these states introduce human rights education at all levels and commending states who have done so.
[299] African Commission "Principles and Guidelines" para 71(5)(3).
[300] Para 71(f)(5).
[301] Para 71(f).
[302] The same argument was made in respect of Article 26 of the UDHR, Article 13 of the CESCR, Article 29 of the CRC, and Article 2 of Protocol 1 of the ECHR. See the text to parts 4 2 4 2, 4 4 3 4, 4 6 4 2, and 5 3 3.

> "Eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular … those customs and practices discriminatory to the child on the grounds of sex/gender or other status".[303]

This is because the ACHPR "protects *positive* African values consistent with international human rights standards" and requires states to eradicate "harmful traditional practices that negatively affect human rights" [*own emphasis*].[304] This too is required when considered in light of the best interests principle and the child's right to protection, in general. According to the Principles and Guidelines, harmful traditional practices include those that promote and entrench discrimination against vulnerable groups. In this regard, the African Commission has explained that practices that negatively affect children's "welfare, dignity, normal growth and development" should be addressed, in particular "customs and practices prejudicial to the health or life of the child" or those that discriminate against children based on "sex/gender or other status".[305]

The M'Baye Draft of the ACHPR incorporated children's rights under various provisions, guaranteeing that children have equal rights regardless of being born out of wedlock and irrespective of their parentage. Children were also "protect[ed] from economic and social exploitation in the context of the right to work" and states were obligated to ensure the "healthy development of the child".[306] Furthermore, parents had the right to "choose the school and religion for their children".[307] In comparison, the ACHPR only deals with children's rights under Article 18(3), providing that states shall protect the rights of the child "as stipulated in international declarations and conventions". Few references have been made to children's rights in the interpretation of the rights enshrined in the ACHPR. Murray explains that this is not strange given the existence of the ACRWC, dealing explicitly and exclusively with children's rights.[308] In general, these references are made in relation to the rights of children in the context of their families.[309]

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[303] African Commission "Principles and Guidelines" para 76(c).
[304] Para 75.
[305] Para 76(g).
[306] Murray (2019) 471 discussing the M'Baye Draft African Charter on Human and Peoples' Rights (28 November-8 December 1979) OAU Doc CAB/LEG/67/1 Articles 8(4) and (6), 11, 12(c), and 25(4).
[307] 472.
[308] 471.
[309] 460 and 472-474. See also, Principles and Guidelines paras 94-95; Resolution on the Situation of Migrants in Africa, ACHPR/ Res. 333 (EXT.OS/ XIX) 2016 (25 February 2016). The African Commission has explained that child labour is prohibited, has expressed concern over the harmful impact of female genital mutilation on the girl-child, as well as how household labour infringes on children's right to education. Furthermore, the African Commission has also called on states to protect refugee children. In discussing the situation of migrants in Africa,

Despite the references made to the best interests principle, it has not been defined in relation to the ACHPR. Given the discussion undertaken here, it is argued that the best interests principle requires the special protection of children because of their inherent vulnerability and the importance of their development. Furthermore, as Article 18(3) refers to the rights of the child "as stipulated in international declarations and conventions", inspiration should be drawn from the CRC and the ACRWC, both of which provides for the best interests principle.[310]

In light hereof, and drawing from the CRC, it is argued that the African child has the right to have their best interests be considered in all matters concerning them. According to the CRC Committee, this means that all decisions or actions that affect children, either as individuals or as a group, should be made considering various factors. These include, but are not limited to, the child's views, their right to preserve their identities, the need to protect them, the importance of promoting their development, as well as giving effect to their rights to health and education, amongst others.[311]

Considering the increasing reliance of the African Commission and the African Court on international human rights law, it is suggested that the UDHR and the ICESCR can guide the interpretation of the right to education under the ACHPR. As mentioned above, the African Commission and the African Court also consider facts in light of all applicable rights, not just those alleged to have been violated. This approach simplifies the holistic development of the right to education, informed by the rights to human dignity and non-discrimination.

Although there is no explicit reference to non-heteronormative SOGIE concerning the right to education, the discussion undertaken here illustrates the importance of education to the development of the child. This is in line with the obligation on states to adopt special measures to "ensure that *all* children, including those belonging to vulnerable and disadvantaged groups, enjoy equal access to and progress in the educational system" [*own emphasis*].[312] Furthermore, in discussing the general obligations on states in realising socio-economic rights under the ACHPR, the African Commission explains that states should adopt measures towards addressing discrimination based on sex, gender, and sexuality.[313] In light of the broad

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the African Commission called on states to refrain from detaining undocumented migrants, especially where families with children or unaccompanied children are involved. In its Principles and Guidelines, the African Commission also explained that spouses have equal rights in respect of their children, even where the spouses are separated. Importantly, all of this is subject to the best interests of the child.

[310] This is also in line with Articles 60 and 61 of the ACHPR which allows the African Commission to draw from international human rights instruments. The African Court has the same mandate in terms of Article 7 of the African Court Protocol.

[311] See the text to part 4 6 2.

[312] African Commission "Principles and Guidelines" para 71(p).

[313] Para 38.

understanding of these terms, in particular gender, it is suggested that discrimination based on non-heteronormative SOGIE is prohibited within the context of the right to education.

7 4 ACRWC

7 4 1 Weighing the best interests of the child and the child's right to participate against the duties imposed by Article 31

The ACRWC, like the CRC, defines 'child' as anyone under the age of 18.[314] Article 1 places comprehensive obligations on states to realise the rights of children. Article 1(1) requires states to recognise the rights enshrined under the ACRWC, taking steps to give effect to these rights through adopting necessary legislative or other measures.[315] Article 1(2) adds to this obligation that where national legislation or an applicable international convention places a heightened obligation on a state, that standard should apply. In this sense, the ACRWC sets out the minimum standards applicable to children's rights.[316] Furthermore, Article 1(3) requires that traditional, cultural, or religious practices inconsistent with the ACRWC should be discouraged.

The overarching purpose of the obligations is to guarantee children's rights and prevent violations thereof. It applies equally in respect of civil and political rights as it does to economic, social, and cultural rights.[317] The ACRWC, therefore, "adopts a holistic approach to issues relating to the rights and welfare of the child by affirming the principle that rights are indivisible and interdependent".[318] Corresponding to the CRC, the ACRWC lists (i) non-discrimination, (ii) the best interests of the child, (iii) the right to life, survival, and development, and (iv) the right to participate in decision-making as the four core principles of children's rights.[319] These core principles guide all state obligations.

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[314] Murray *Human Rights in Africa* 167: This overrides the African cultural and traditional determination of the end of childhood on factors other than age.

[315] ACERWC "General Comment 5 on state party obligations under the African Charter on the Rights and Welfare of Rights and Welfare of the Child (Article 1) and systems strengthening for child protection" (2018) 6-7. Like under the ACHPR, Article 1(1) imposes an obligation of progressive realisation. Although the financial constraints of states must be taken into account when determining compliance with its obligations, it cannot excuse a failure to take steps towards the fulfilment of children's rights. See also, *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania* Communication 003/2015 (15 December 2017) ("*Salem*"), for a discussion on the application of Article 1(1).

[316] DM Chirwa "The merits and demerits of the African Charter or the Rights and Welfare of the Child" (2002) 10 *IJCR* 157 158.

[317] ACERWC "General Comment 5" 6-7.

[318] Chirwa (2002) *IJCR* 157.

[319] See the text to part 4 6 2.

Importantly, Article 4 of the ACRWC enshrines the best interests principle, stating that "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be *the* primary consideration" [*own emphasis*]. In comparison, the CRC provides that the best interests of the child shall be *a* primary consideration.[320] In this context, the ACERWC stated that:

> "[T]he best interests standard applies across cultural, political and geographical settings, to members of all ethnic groups, and, as "the primary consideration", must be an extremely important consideration, when ranked against any other competing considerations".[321]

Vollmer explains that this means that no other consideration can be elevated above the child's best interests.[322] This supports the argument presented below that cultural, religious or moral considerations cannot be used to limit the right to education of children with non-heteronormative SOGIE. In this regard, drawing from the CRC Committee, the ACERWC has also confirmed that the best interests principle is "flexible and adaptable so that it can be applied to the needs of children taking into account their special circumstances".[323]

According to Sloth-Nielsen, "[i]n customary and traditional African society, children occupied a silent space in the kinship structure, depending on adult intervention for a voice".[324] The ACRWC represents a shift from this approach, with Article 4(2) requiring that states "develop laws and policies that allow child participation in matters that concern them".[325] Through participation in decision-making, children become "engaged actors rather than passive beneficiaries of their rights".[326] Due weight should be accorded to children's views on what would be in their best interests to ensure that it leads to real change.[327] The ACERWC has recognised the challenges relating to implementing child participation in different contexts.

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[320] Murray *Human Rights in Africa* 167. See also, Chirwa (2002) *IJCR* 160.
[321] ACERWC "General Comment 5" 11. See also, A Lloyd "The African regional system for the protection of children's rights" in J Sloth-Nielsen (ed) *Children's rights in Africa: a legal perspective* (2008) 33 37.
[322] Vollmer *Queer families* 267.
[323] Communication 003/2015 (15 December 2017) para 66. See the text to part 4 6 2.
[324] J Sloth-Nielsen "Children's rights and the law in African context: an introduction" in J Sloth-Nielsen (ed) *Children's rights in Africa: a legal perspective* (2008) 3 6. See also, Chirwa (2002) *IJCR* 160. Similarly, Chirwa explains that provision made for child-participation is significant seeing that "[c]hildren are normally considered to be deficient in their decision-making capabilities and deserving of protection. Decisions concerning children are often made by a group of male elders. At most, children are heard indirectly, e.g., through aunties, uncles or grandparents".
[325] ACERWC "General Comment on Article 22 of the African Charter on the Rights and Welfare of the Child: Children in situations of conflict" (2020) para 32.
[326] Lloyd "The African regional system for the protection of children's rights" in *Children's rights in Africa* 38.
[327] ACERWC "General Comment 5" 14. See also, ACERWC "General Comment on Article 22" para 31.

Regardless, the ACERWC still encourages states to integrate child participation in official processes.[328] To this end, it has listed nine principles of child participation that should be complied with, requiring that:

> "[P]rocesses should be transparent and informative; voluntary; respectful; relevant; child friendly; inclusive; be supported by training for adults; be safe and sensitive to risk; and be accountable".[329]

Although the ACRWC contains comprehensive protections for children's rights, it also imposes obligations on the child. Article 31 imposes duties on the child towards their families, communities, and the state. This is similar to the duties imposed under the ACHPR.[330] The duties of the child should, nonetheless, be in line with the purpose of the ACRWC, namely the promotion and protection of children's rights.[331] Considering this, Article 31 should be viewed in the larger context of the ACRWC and cannot be used to limit children's rights in favour of their responsibilities.[332] The purpose of Article 31 is not to restrict the rights enshrined under the ACRWC.[333] Rather, the ACERWC understands responsibilities as cultivating children's participation in decision-making, helping them "contribute to shaping their own lives, families, communities and the wider society".[334]

Article 31(a) requires children to "work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need". According to Chirwa, this duty of respect can undermine the right of the child to participate in decision-making.[335] However, the ACERWC has explained that this does not mean that children should obey adults without question or that this can be expected.[336] Rather, it should be considered in light of the obligation on parents and caregivers "to ensure, to the best of their abilities and capabilities, the proper care and upbringing of the child until adulthood".[337] This can also be applied in the context of education, where children are expected to respect their teachers.

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[328] 13.
[329] 14.
[330] Article 27(1) provides that "[e]very individual shall have duties towards his family and society, the State and other legally recognized communities and the international community". See also the text to part 7 3 2 1.
[331] ACERWC "General Comment on Article 31 of the Charter on the Rights and Welfare of the Child on the responsibilities of the child" (2017) paras 13-14.
[332] Paras 17 and 48. See also the text to part 7 3 2 1.
[333] Paras 7 and 11-12.
[334] Para 19.
[335] Chirwa (2002) *IJCR* 169.
[336] ACERWC "General Comment on Article 31" para 58.
[337] Para 65.

Of particular relevance is the obligation imposed on children under Article 31(d) to "preserve and strengthen African values". This refers to *positive* African values, excluding those that perpetuate harmful practices against children.[338] In this regard, Article 21(1) becomes relevant, placing an obligation on states to:

> "[T]ake all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the ground of sex or other status".

The ACERWC has expanded on this, including "all behaviours, attitudes and or/practices" that undermine children's fundamental rights.[339] In this regard, specific reference has been made to the right to human dignity, health, mental and physical integrity, and development.[340] In particular, these practices are harmful "regardless of their being condoned by a society, culture, religion, or tradition".[341] For example, in its joint general comment on ending child marriage, the ACERWC explained that child marriage is harmful because it "reinforces harmful social constructions of gender, supports systems of patriarchy and entrenches patterns of discrimination".[342] Here, the ACERWC illustrates a constructionist understanding of gender, how heteronormativity facilitates the infringement of fundamental rights, and how this can facilitate the continued existence of harmful practices under the guise of culture.

The obligation to eliminate harmful practices exists because practices that undermine the fundamental rights enshrined under the ACRWC cannot be justified.[343] Lloyd argues that this is significant because harmful practices often have their origins in culture or religion.[344] Eradicating these practices can prove challenging because of the perceived threat to cultural values or being a western import.[345] However, in light of the discussion under 2 5, it is clear that non-heteronormative SOGIE was not brought to the continent with colonialism. Instead, research suggests that persons with non-heteronormative SOGIE often played an important role

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[338] Para 76.
[339] ACERWC/ African Commission "Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on ending child marriage" (2017) para 6.
[340] ACERWC "General Comment 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality" (16 April 2014) ACERWC/GC/02 (2014) para 30.
[341] Para 30.
[342] ACERWC/ African Commission "Joint General Comment on ending child marriage" para 11.
[343] See the text to part 7 3 2 1.
[344] A Lloyd "The African regional system for the protection of children's rights" in J Sloth-Nielsen (ed) *Children's rights in Africa: a legal perspective* (2008) 33 39.
[345] 39.

in pre-colonial African societies.[346] Furthermore, considering non-discrimination as *jus cogens*, morality cannot justify the limitation of rights of persons with non-heteronormative SOGIE because it constitutes an arbitrary deprivation of rights.[347]

Article 21(1)(b) has specific relevance when considering the right to education of children with non-heteronormative SOGIE. Where children are denied their right to education as a result of the non-recognition of their non-heteronormative SOGIE, with non-recognition derived from religious and cultural beliefs, this can constitute a harmful practice. It is suggested that discriminating against children based on their non-heteronormative SOGIE in schools can constitute a harmful practice because: (i) it denies the recognition of the child's inherent human dignity; (ii) it reinforces harmful stereotypes and encourages unjustifiable discrimination; and (iii) it prevents children with non-heteronormative SOGIE from enjoying the right to education – a fundamental right enshrined under the ACRWC.

7 4 2 Dignity

The Preamble to the ACRWC recognises that children, due to their vulnerability, require special care and legal protection to ensure their development "in conditions of freedom, *dignity* and security" [*own emphasis*]. Unlike the ACHPR, the ACRWC does not enshrine an exclusive provision dealing with the right to human dignity. However, human dignity has been mentioned in the interpretation of numerous provisions, as further discussed below.

Article 6 contains the right to a name and nationality. According to the ACERWC, the use of the term "every child" means that the right finds universal application.[348] In *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v Kenya*, the ACERWC held that the refusal of the Kenyan state to legally recognise children of Nubian descent "is an affront to their dignity" and prevents them from enjoying their rights under the ACRWC.[349] Although this statement was made in the context of the impact of statelessness on children, it should also be applied in respect of legal gender recognition of official documents. Relying on the decisions of the ECtHR in *Goodwin*, the ECSR in *Transgender Europe*, and the IACtHR's advisory opinion on the *Gender Identity, and Equality and Non-discrimination of Same-sex Couples*, it is argued

[346] See the text to part 2 5.
[347] See the text to part 7 3 2 1.
[348] ACERWC "General Comment 2" para 50.
[349] Communication 2/2009 para 57. See the text to part 7 3 1 for a discussion on *Nubian Community*, a decision of the African Commission with similar facts.

that denying legal gender recognition to children with non-binary gender identities or gender expressions violate their inherent human dignity and compromises their ability to enjoy other rights.[350]

Article 13 protects the rights of disabled children and requires states to adopt special measures of protection to ensure respect for their inherent dignity. Drawing from the African Commission's decision in *Purohit*, the ACERWC has explained that referring to mentally disabled children as "lunatic" or "idiots" is undignifying.[351] Furthermore, it has also been recognised that legislation that discriminates against disabled children prevents them from pursuing their "hopes, dreams and goals" like all other persons.[352] The ACERWC, therefore, recognises the potential degrading impact of language and its effects on the child's human dignity, sense of belonging and self-worth.[353] This is similar to the approach under the UDHR.[354] Considered in the context of this research and in light of the discussion in part 1 1, using degrading language in legislation or to address learners with non-heteronormative SOGIE infringes on their inherent dignity.

Human dignity has also been referred to in relation to Article 16, which protects children against degrading treatment. Article 16 reads similar to Article 5 of the ACHPR, with the exception that a specific reference to human dignity is excluded. The ACERWC in *IHRDA v Cameroon* nonetheless explained that Article 16 aims to protect children from violations of their inherent dignity, as well as their physical and mental integrity.[355] This approach is in line with that of the Human Rights Council, the CRC Committee, the ECtHR, and the ACtHR, and the African Commission, all of which have referred to the impact of degrading treatment on human dignity. Importantly, these bodies have also agreed that degrading treatment has a wide scope including physical, emotional or mental violence, as well as corporal punishment [356]

As reiterated throughout this dissertation, despite the protection from abuse of children under international and regional law, children are often subject to abuse at the hands of teachers, parents, or other adults, people who should protect them.[357] Although, as mentioned under 1 1, there exists little research on the discrimination and marginalisation experienced by children with non-heteronormative in SOGIE at schools, this does not mean that the problem

[350] See the text to parts 5 3 1, 5 4 1, and 6 4 2.
[351] ACERWC "General Comment 2 para 52. See also the text to part 7 3 1.
[352] Para 53.
[353] See discussion of *Atala* in the text to part 6 4 2 2.
[354] See the text to part 4 2 2.
[355] Communication 002/2015 (May 2018) paras 68 and 74.
[356] See the text to parts 4 2 4, 4 6 2, 4 6 4 1, 5 3 1, 6 4 1, and 7 3 1.
[357] Kassan "The protection of children from all forms of violence" in *Children's rights in Africa* 165.

does not exist. Rather, as Kassan explains, all forms of violence against children are often underreported and under-investigated.[358] This is even more so insofar as it relates to children with non-heteronormative SOGIE. Given the broad understanding of degrading treatment, bullying or discriminating against learners based on their non-heteronormative SOGIE is prohibited under Article 16(1).

7 4 3 Non-discrimination

The prohibition of discrimination is the core of the ACRWC and applies in respect of all its substantive provisions. Article 3 of the ACRWC provides that:

> "Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or [their] parents' or legal guardians' … sex … or other status".

The wording is similar to the ACHPR and the human rights instruments discussed under chapters 4 to 6. The test applied to determine whether differential treatment constitutes unfair discrimination under the ACRWC was derived from the ACHPR and is, therefore, identical.[359] Importantly, the ACERWC has explained that Article 3 does not require all persons to be treated the same. Rather, states should identify children who are particularly vulnerable to discrimination and have to adopt "special measures in order to diminish or eliminate conditions that cause discrimination".[360]

The ACERWC's decision in *IHRDA v Kenya* is relevant to the obligation on states to take special measures in respect of vulnerable groups. The facts are similar to those of *Nubian Community*.[361] The ACERWC acknowledged the importance of birth registration to ensuring that children are included in their communities.[362] Statelessness or any other form of non-recognition leaves the child vulnerable because legal recognition is often required for accessing certain rights, for example, the right to education and health care.[363]

Children of Nubian descent were "treated differently from other children in Kenya" who were registered at birth. Because there was no legitimate justification for the differentiation,

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[358] 173.
[359] See the text to part 7 3 2 1.
[360] ACERWC "General Comment 5" 9-10.
[361] See the text to part 7 3 1.
[362] Communication 2/2009 para 38.
[363] Para 46.

there was a *prima face* case of unfair discrimination based on race and ethnicity under Article 3 of the ACRWC.[364] As a result, the burden shifted to the state to justify the differentiation.[365] Drawing from the African Commission's decision in *LRF v Zambia*[366], the ACERWC explained that discrimination will be justified where there exists a legitimate state interest, with a proportionate relationship between the limitation and the aim sought to achieve. The limitation "must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained".[367] None of the reasons presented by the state passed this test. Considering the inherent dignity of the child, as well as their best interests, the ACERWC decided that the failure to recognise the rights of the Nubian peoples on an equal basis to other Kenyans "violate[d] the principle of equal treatment … [and] ha[d] no place in a democratic and pluralistic society".[368]

Similarly, in *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania*, it was alleged that Article 3 was violated because the enslaved children were treated differently to the children of their slave-master based on their Haratine ethnic heritage, as well as their status as slaves.[369] The ACERWC reiterated the test applicable to determine whether differentiation constitutes discrimination.[370] Because slavery is prohibited under national and international law, there can be no justification.[371]

The decisions in *IHRDA v Kenya* and *Salem* illustrate the importance of non-discrimination to the enjoyment of all the rights enshrined under the ACRWC, requiring states to take special measures in respect of vulnerable children. States must take steps to ensure that all children are guaranteed their rights under the ACRWC. This obligation should be viewed in the context of the aim of the ACRWC to ensure that children grow up to become active members of their communities, contributing to its development. In this context, it is also possible to draw on Rudman's reference to non-discrimination as *jus cogens* and the resulting inability to justify discrimination based on non-heteronormative SOGIE.[372]

Despite the absence of any reference to non-heteronormative SOGIE, the ACERWC has established a broad understanding of gender-based discrimination in *IHRDA and Finders*

[364] Para 55.
[365] Para 56.
[366] See the text to part 7 3 2 1.
[367] Para 57.
[368] Para 56.
[369] Communication 003/2015 paras 59-60.
[370] Para 61.
[371] Para 61.
[372] See the text to part 7 3 2 1.

Group Initiative on behalf of TFA (a minor) v Cameroon.[373] The facts concerned the rape of a girl-child, then aged 10, and the subsequent failure of the state to investigate the sexual violence perpetrated. The complainants alleged that this failure constituted gender-based discrimination, prohibited under Article 3.[374] Although acknowledging that gender-based discrimination is prohibited, the ACERWC stated that it is unclear whether sexual violence constitutes gender-based discrimination.[375] In its determination of whether sexual violence constitutes gender-based discrimination, the ACERWC drew from CEDAW.[376]

In General Comment 19, the CEDAW Committee defined gender-based violence as "violence that is directed against a woman because she is a woman or that affects women disproportionately".[377] The ACERWC agreed with the CEDAW Committee that gender-based violence includes rape.[378] In this regard, the ACERWC explained that gender-based discrimination includes gender-based or sexual violence because:

> "[It] is caused by a deep-rooted ideology and stereotype that men have privilege over women as well as the cultural urge to ensure men's power and control over women. In addition, violence against women perpetuates the relegated status women have been socially given for a long period of time".[379]

However, the ACERWC went further, holding that the social subordination of women in itself constitutes gender-based discrimination because it sustains the beliefs and attitudes regarding men's dominance that causes and maintains gender-based violence.[380] Moreover, the ACERWC recognised that "[w]omen suffer from gender-based violence because of the unequal distribution of power between men and women".[381] In light hereof, it was held that gender-based violence, through its disproportionate impact on women, constitutes gender-based discrimination.[382]

In *Finders Group Initiative*, the ACERWC illustrated a constructionist understanding of gender and how the design of societies to serve African masculinity sustains inequality, discrimination, and violence.[383] It is suggested that, through this decision, the ACERWC set

[373] Communication 002/2015 (May 2018) ("*Finders Group Initiative*").
[374] Para 18.
[375] Para 59.
[376] See the text to part 4 5.
[377] CEDAW Committee "General Recommendation 19: Violence against women" (1992) A/47/38 para 6.
[378] Communication 002/2015 para 60.
[379] Para 61.
[380] Para 62.
[381] Para 62.
[382] Para 62.
[383] See the text to parts 2 3 1, 2 4, 2 5 2, and 2 6 3.

the framework for understanding gender-based discrimination as including discrimination based on non-heteronormative gender identities or gender expressions in the future.

7 4 4 Education

7 4 4 1 Right to education

The ACRWC does not add any socio-economic rights to those enshrined under the ACHPR. Instead, it defines these rights in greater detail and considers its application to children.[384] The ACRWC provides a comprehensive right to education under Article 11.[385] Like the ACHPR, the ACERWC has drawn from the CESCR in asserting that states should ensure that education is available, accessible, acceptable, and adaptable.[386]

Article 11(1) provides every child with the right to education. Considered in light of the right to non-discrimination, Article 11(1) quite literally means that there are no grounds upon which any child can be denied this right. Relying on Article 13(1) of the ICESCR, it is argued that, even though non-heteronormative SOGIE are not listed as prohibited grounds of discrimination under Article 3, the wording of the right to education excludes all forms of discrimination that would prevent any child from enjoying this right.[387] In this regard, the ACERWC, drawing from the CESCR's statement in General Comment 13, explained that Article 11 obligates states to take "deliberate, concrete, and targeted action" to provide education without discrimination. As such, no child may be excluded.[388]

Article 11(3) deals with the more formalistic aspects of education that is required for its full realisation.[389] Article 11(3) not only necessitates the establishment of the appropriate infrastructure and the appointment of qualified teachers, but also demands that the "well-recognised corollaries of the fulfilment of this right" be provided.[390] Articles 11(3)(d) and (e) are of particular importance, requiring that states:

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[384] DM Chirwa "Combating child poverty: the role of economic, social and cultural rights" in J Sloth-Nielsen (ed) *Children's rights in Africa: a legal perspective* (2008) 91 96.
[385] The right to education under the ACRWC is unique in that it specifically protects the right to education of the girl-child.
[386] Communication 003/2015 para 74. See also, *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v Sudan* Communication 001/2015 (May 2018) para 96.
[387] See the text to part 4 4 3.
[388] Communication 003/2015 para 74.
[389] Education is covered in most concluding observations, but not much is added to the meaning of Article 11.
[390] Communication 003/2015 para 63.

> "[T]take measures to encourage regular attendance at schools … [and] take special measures in respect of … disadvantaged children, to ensure equal access to education for all sections of the community"

In *IHRDA v Kenya*, children from Nubian communities were provided with fewer schools and fewer resources for education. The ACERWC found a violation of the right to education because the state did not take the necessary measures to ensure that children from Nubian communities, as a disadvantaged group, had equal access to education.[391]

Similarly, the ACERWC in *Hunsungule v Uganda*[392] also found a violation of Article 11(3)(e) for the same reason, but in respect of children affected by armed conflict as a disadvantaged group.[393] The state argued that the insurrection in Northern Uganda from 1986 to 2005 complicated its ability to comply with its obligations imposed under Article 11.[394] However, the ACERWC drew attention to the title of the ACRWC which indicates that the promotion and protection of the rights of the child should result in their "well-being and welfare". As a result, states are obligated to "promote and improve the lived reality of children on the ground" regardless of the circumstances.[395] In determining whether the state violated Article 11, the ACERWC recognised the "important role of education for creating an Africa fit for children".[396] Whether the state complied with the obligations imposed by Article 11 depends on whether it took all reasonable measures given the circumstances.[397] Here, the ACERWC considered the efforts of the state to build schools in camps, setting up scholarships, increasing the education budget, as well as providing capital for various campaigns that helped children get back to school.[398]

7 4 4 2 Aims of education

Article 11(2) lists the aims of education. These are similar to those provided under the UDHR, CRC and the ICESCR, but with some elements added to it.[399] According to Article 11(2), education should be aimed at the development of the child, fostering respect for human rights

[391] Communication 2/2009 para 65.
[392] Communication 1/2005 (15-19 April 2013).
[393] Para 63.
[394] Para 37.
[395] Para 38.
[396] Para 63.
[397] Para 69.
[398] Para 66.
[399] See the text to parts 4 2 4 2, 4 4 3, and 4 6 4 2.

and fundamental freedoms, strengthening *positive* African values, and preparing the child for a responsible life in society in the spirit of tolerance and mutual respect amongst all peoples.[400]

The developmental aim of education should be viewed in the context of Article 5(1), which places an obligation on states to ensure children's development to their full potential.[401] The developmental aim of education is linked to the purpose of enabling children to grow up into active members of their communities, contributing to its future improvement. To this end, education should equip children with the necessary life-skills.[402] The role of education in fostering respect for human rights and strengthening positive African values is central.

Strengthening and preserving positive African values require that children "be taught and encouraged to avoid xenophobic, discriminatory and disrespectful attitudes and practices in all settings, as they detract from the moral well-being of society".[403] Under the ACHPR, positive African values are defined as those that are consistent with international human rights standards, including those that encourage solidarity and mutual care.[404] In comparison, under the ACRWC, harmful cultural practices guide what cannot be included under positive African values. As discussed in 7 4 1, harmful practices refer to those that undermine fundamental rights, such as the right to education. Thus, in the context of education, behaviours or practices that discriminate against children based on their non-heteronormative SOGIE should be discouraged.

The ACERWC has further explained that education should teach children about their own diverse national communities, but also about the African continent and the world in general. Children should also be taught how to "maintain good and healthy relations with their peers and play with other children in a spirit of respect, tolerance and equality with one another".[405] Through this, education can contribute to inculcating the values of understanding and friendship amongst peoples, promoting African solidarity.[406] Despite its central notion that "every individual is an extension of others", African solidarity does not refer to or necessarily even promote homogeneity.[407] Rather, it underscores the notion that everyone has an important role to play in ensuring the functioning and development of their societies. In this way, African

[400] See the text to parts 7 4 1 and 7 4 3.
[401] ACERWC "General Comment 5" 12.
[402] ACERWC "General Comment: Article 31" para 33.
[403] Para 78.
[404] See the text to part 7 3 2 1.
[405] ACERWC "General Comment: Article 31" paras 34-35.
[406] Chirwa (2002) *IJCR* 162.
[407] ACERWC "General Comment: Article 31" para 71.

solidarity aims to promote "a common sense of humanity" and "a sense of belonging" in a manner that celebrates difference.[408]

Although not explicitly stated, considering these aims in light of the interpretations under the UDHR, the ICESCR, and the CRC, it is suggested that the ACRWC require human rights education to be incorporated at all levels of education.[409] Human rights education should cover the rights enshrined under the ACRWC, teaching children to respect the human rights of their peers.[410] Education should further reflect values of participation and inclusion, enabling learners to recognise that cultural or moral differences amongst people do not justify discrimination or degradation.[411] An inclusive education also requires that sexual health education cover non-heteronormative SOGIE and remove content that discriminates against persons with non-heteronormative SOGIE from the curriculum.[412] Not only is this central to promoting the aims of education but is required to ensure that all children can indeed enjoy the right to education enshrined under Article 11(1).

7 5 Maputo Protocol

7 5 1 Defining 'women'

Against the backdrop of the discussion under 2 5, men dominate African life.[413] The Maputo Protocol presents a shift from this, providing for the elimination of all forms of discrimination against women. According to Viljoen, the Maputo Protocol aims to address the lack of implementation of the ACHPR and CEDAW in protecting the rights of women in Africa.[414] Although CEDAW was adopted before the ACHPR, the drafters did not afford much attention to its provisions, illustrating a lack of support for CEDAW.[415] However, the ACHPR nonetheless provides explicit protection to women's rights under Article 18(3). Significantly, Article 18(3) requires eliminating discrimination against women "as stipulated in international declarations and conventions".[416] Through this, CEDAW can guide the interpretation of women's rights under the ACHPR.

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[408] Para 71.
[409] See the text to parts 4 2 4, 4 4 3, and 4 6 4.
[410] See the text to part 4 2 4 1.
[411] See the text to part 4 4 3.
[412] See the text to parts 4 2 4, 4 4 3, and 4 6 4.
[413] See also, Viljoen "The African Regional Human Rights System" in *International Protection of Human Rights* 249.
[414] 251.
[415] 252.
[416] 252-253. Viljoen argues that the failure of Article 18(3) of the ACHPR to stipulate the ratification of international declarations and conventions means that CEDAW can bind states under Article 18(3) even in the

Despite the protection of women's rights under the ACHPR and CEDAW, the Maputo Protocol is valuable for establishing an African-specific instrument focused solely on the challenges facing women in Africa in the recognition and realisation of their rights. Through this, the Protocol also "locates CEDAW in the African reality and returns some casualties of the quest for global consensus into its fold". [417] The Preamble of the Maputo Protocol states that its purpose is to:

> "[E]liminate all forms of discrimination and harmful practices against women … [including] any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls".

Article 1(k) defines "women" as "persons of female *gender*, including girls" [*own emphasis*]. In comparison, "discrimination against women" is defined as "any distinction, exclusion or restriction … based on *sex*" [*own emphasis*]. The Maputo Protocol, therefore, seems to view "sex" and "gender" as interchangeable concepts. However, as set out under 2 2 1, sex and gender are distinct. Whereas sex is biological, gender is a social construct and a personal experience. The idea that sex is determinative of gender or sexual orientation is a result of conflation.[418] In turn, this conflation has made its way into all aspects of life, establishing heteronormativity as the only acceptable way of being.[419] However, as illustrated under chapters 4 to 6, the international, European and inter-American human rights systems have started unpacking this, calling for legal and social reform.

Although discrimination against women is defined with reference to sex, it is suggested that, when considering the provisions of the Maputo Protocol, the need to eliminate discrimination is not based on biological attributes. For example, although Article 2(2) refers to "practices which are based on the idea of the inferiority or the superiority of either of the *sexes* [*own emphasis*]", states are required to eliminate this through adjusting the social and cultural expectations regarding suitable behaviour for women and men. The focus on modifying social and cultural behaviours and attitudes correspond to an understanding of gender that appreciates

absence of its ratification. In this sense, Viljoen argues that CEDAW is incorporated under Article 18(3). However, this is a debatable argument. Although the African Commission and African Court can utilise CEDAW to guide its interpretation of women's rights under the ACHPR, it is unlikely that it can impose obligations on states in terms of CEDAW where the state in question has not ratified it. In this regard, Articles 11-15 of the Vienna Convention is relevant, requiring states to express its consent to be bound by a treaty.

[417] 253.

[418] See the text to part 2 2 2.

[419] See the text to parts 2 4 and 2 6 3.

heteronormativity as a site of violence.[420] This is supported by the African Commission and the ACERWC's developing understanding of the meaning of gender-based discrimination and how African masculinities undermine the rights of women, girls, and children.[421] The mere existence of women with non-heteronormative SOGIE challenges the traditional gender roles and the dominance of men in African societies.[422] It has been shown that these individuals, as a result of not conforming to expected expressions, are at a heightened risk of discrimination and violence.[423] As such, protecting the rights of women with non-heteronormative SOGIE has direct bearing on the obligation on states to address attitudes or behaviour that promotes or maintain women's inferiority to men.

Against this backdrop, it is argued that "women" under the Maputo Protocol includes persons with non-heteronormative SOGIE. Where a female identifies as a woman, but has a non-heteronormative sexual orientation, it is still simple to include them under the definition of "women".[424] In comparison, where a male identifies and expresses herself as a woman, the situation becomes more complex as a result of the conflation of sex and gender in many modern African cultures.[425] However, if gender is understood in terms of a constructionist approach, women with non-heteronormative gender identities or gender expressions do fall under the definition of "women" based on their experience of themselves as women.[426]

The conflation of sex, gender, and sexual orientation in domestic legislation that criminalises homosexuality means that there is no appreciation of the distinction between homosexual men and transgender women. In effect, this often leads to the persecution of transgender women under the guise of the criminalisation of homosexuality because, like homosexual men, transgender women "do not comply with the heteronormative expectation of what a 'real' man is".[427] In this way, heteronormativity justifies human rights violations.[428]

In comparison with the Maputo Protocol, CEDAW and the Convention of Belém do Pará do not define "women".[429] Under both CEDAW and the Convention of Belém do Pará, woman is defined with reference to "violence against women". Although CEDAW defines

[420] See the text to part 2 6 2.
[421] See the text to parts 7 3 2 and 7 4 1.
[422] See the text to part 2 5 2
[423] See the text to parts 1 1, 4 2 3, 4 4 2, 5 3 2 2, 5 4 2, 6 3 2, and 6 4 2 2.
[424] See the text to part 7 5 3.
[425] See the text to part 2 5.
[426] See the text to part 2 2.
[427] TC Snyman *The protection of African transgender women's right to dignity, life and health through a teleological reading of the Maputo Protocol* LLM thesis Stellenbosch University (2019) 49.
[428] Oloka-Onyango "Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya" (2015) 15 *AHRLJ* 49 50. See also, Snyman (2019) 49.
[429] See the text to parts 4 5 2 and 6 5 2.

discrimination against women as a "distinction, exclusion or restriction" based on sex, it has nonetheless been interpreted as including gender. In this regard, reference has been made to the difference between sex and gender and concern expressed over discrimination against women based on sexual orientation and gender identity.[430] According to MESECVI, "women" includes any person who identifies as a woman. Its reports illustrate that this includes women with non-heteronormative SOGIE.[431] The Maputo Protocol contains corresponding rights to CEDAW and the Convention of Belém do Pará. As a result, it is argued that, despite the limited references to women with non-heteronormative sexual orientation and the absence of any reference to women with non-binary gender identities or gender expressions, women with non-heteronormative SOGIE are nonetheless protected under the Maputo Protocol.

7 5 2 Human dignity and the obligation to eliminate harmful practices

Article 3 enshrines an explicit right to human dignity. This includes the right to legal recognition, respect for the free development of the personality, and protection from all forms of violence. *Nubian Community* and *IHRDA v Kenya* illustrated that the African Commission and the ACERWC appreciate the relationship between legal recognition for minority groups and the ability to enjoy fundamental rights.[432] As a result of its relationship with the inherent dignity of individuals, the right to legal gender recognition has been established under the ICCPR, the ECHR, the ESC, and the ACHR.[433] According to the ECtHR in *Goodwin*, due to its connection to human dignity, the development of the individual, and their sense of self, legal gender recognition cannot be refused as a result of being deemed controversial by certain sectors of society.[434] Correspondingly under the international and regional human rights treaties discussed in chapters 4 to 6, human dignity under the Maputo Protocol is also tied to the free development of the human personality.[435] In this regard, the African Commission in General Comment 2 stated that:

> "The right to dignity enshrines the freedom to make personal decisions without interference from the State or non-State actors. The woman's right to make personal decisions involves taking into

[430] See the text to part 4 5 2.
[431] See the text to part 6 5 2. Importantly, MESECVI has explicitly referred to discrimination based on sexual orientation and gender identity as prohibited grounds of discrimination. See, for example, OAS "Hemispheric Report on Child Pregnancy" para 55.
[432] See the text to parts 7 3 1 and 7 4 2.
[433] See the text to parts 4 3 2 2, 5 3 1, 5 4 1, and 6 4 2 2.
[434] See the text to part 5 3 1.
[435] See the text to parts 4 2 2, 4 6 1, 5 3 1, 5 4 1, and 6 4 1.

> account or not the beliefs, traditions, values and cultural or religious practices, and the right to question or to ignore them".[436]

According to Vollmer, this means that states should not "interfere in personal decisions", including matters related to SOGIE.[437] It also means that states cannot justify infringements on the right to dignity by arguing that it is contrary to cultural values.[438] The Preamble to the Maputo Protocol defines "positive African values" as those that are "based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy".[439] This corresponds with the approach under the ACHPR, in terms of which African values are only deemed positive, and therefore protected, if they correspond to standards of international human rights law.[440] As established under 7 4 1, harmful practices are contradictory to positive African values because it undermines fundamental rights.[441] Similarly, the Maputo Protocol defines harmful practices as:

> "[A]ll behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity".[442]

This is similar to the ACRWC.[443] However, the Maputo Protocol goes further than the ACHPR and the ACRWC in the obligations imposed on states to eliminate all forms of harmful practices. This requires creating public awareness of harmful practices through education programmes and taking steps to protecting at-risk women.[444] The elimination of harmful practices should also be viewed in the context of Article 3(4) which requires states to respect women's dignity and to protect them from "all forms of violence, particularly sexual and verbal violence".

The African Court's judgement in *APDF and IHRDA v Republic of Mali*[445] illustrated that culture, morals, and religion cannot outweigh international human rights standards. In 2009, Mali adopted a Family Code that was in line with international law standards regarding the age

[436] African Commission "General Comment 2" para 24.
[437] Vollmer *Queer families* 244.
[438] 244.
[439] Preamble to the ACRWC.
[440] See the text to part 7 3 2 1.
[441] See the text to part 7 4 1.
[442] Article 1(g) of the Maputo Protocol.
[443] See the text to part 7 4 1.
[444] Articles 5(a) and (d) of the Maputo Protocol.
[445] (046/2016) [2018] AfCHPR 15 (11 May 2018) ("*APDF*").

of and consent to marriage, as well as inheritance rights.[446] As a result of Islamic-led protests, this law could not be promulgated and a new Family Code was adopted and promulgated in 2011.[447] The new Family Code allowed marriage from the age of 15, did not require "verification of the parties' consent by religious ministers", and enshrined "religious and customary law as the applicable regime, by default, in matters of inheritance".[448] As a result, the state violated numerous provisions of the ACRWC, the Maputo Protocol, and CEDAW, including the obligation of states to "eliminate traditional practices and conduct harmful to the rights of women and children".[449]

The significance of this matter lies in the reparations ordered. The African Court went beyond stating that the new Family Code be amended to comply with the ACRWC, the Maputo Protocol, and CEDAW.[450] It held that the state is obligated to sensitise and educate the "population on the dangers of early marriage… [and to] ensure equal share of inheritance between legitimate children and children born out of wedlock … [and] between man and woman".[451] The decision indicates that the African Court appreciates that Africans are not a homogenous group; diverse cultures and morals should be able to co-exist in a manner that allows all persons to enjoy the fundamental human rights that they are entitled to. The judgement further elucidates state obligations in respect of implementing positive measures of re-socialisation to ensure that the population understand their rights and are thus enabled to enjoy them.

7 5 3 A right to education without discrimination

Article 12 of the Maputo Protocol places comprehensive obligations on states to ensure the right to education of women without discrimination. These obligations should be read with those imposed on states under Article 2, which provides for the elimination of discrimination against women. Neither Article 1(f), nor Article 2 provides a list of prohibited grounds of discrimination. This corresponds to the approach under CEDAW and the Convention of Belém do Pará.[452] However, as indicated under 7 5 1, 'women' should be given a wide meaning, including any person who identifies as a woman in the gendered sense of the word.

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[446] Paras 5 and 9.
[447] Para 6.
[448] Paras 60, 79, and 96.
[449] Article 1(3), 2-4 and 21 of the ACRWC; Article 2(2), 6(a)-(b) and 21(2) of the Maputo Protocol; Article 5(a) and 16(1)-(b) of CEDAW.
[450] (046/2016) [2018] AfCHPR 15 (11 May 2018) para 126.
[451] Paras 16 and 126.
[452] See the text to parts 4 5 2 and 6 5 2.

In General Comment 2, the African Commission recognised the impact of intersecting grounds of discrimination, such as "sex, sexuality, sexual orientation, age … harmful customary practices and/or religion", on the ability of women to realise their rights.[453] This is of particular relevance in the context of the right to education of children with non-heteronormative SOGIE because multiple grounds of discrimination are involved; sex, gender, sexual orientation, gender identities or gender expressions and age.

Article 12(1)(a) requires states to "eliminate all forms of discrimination against women and guarantee equal opportunity and access". According to Article 2(1), discrimination should be eliminated through the adoption of "appropriate legislative, institutional and other measures". These measures should prohibit and prevent practices that are harmful to the well-being of women, ensure that a gender perspective is incorporated in the formulation and implementation of these measures, as well as "take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist".[454]

In the context of education, Article 2(1) means that states should adopt legislation that is explicit in its prohibition of discrimination against the girl-child, as well as policies aimed at assuring this. It is suggested that the incorporation of a gender perspective requires states to, in line with Article 2(2), adjust social and cultural ideas and practices that undermine the rights of women in favour of those that serve African masculine ideals. In this regard, Article 12(1)(b) provides guidance, indicating that states should "eliminate all stereotypes in textbooks [and] syllabuses … that perpetuate such discrimination". As such, Article 2(2), read with Article 12(1)(b), stipulates that states cannot choose to only depict men and women in terms of heteronormative ideals as this would undermine the equality that the Maputo Protocol seeks to promote. Rather, educational materials should include persons with non-heteronormative SOGIE in the same manner as persons with heteronormative SOGIE. Thus, derogatory content that encourages violence or discrimination should be removed. This approach has been confirmed under the CRC and the ESC.[455]

Related to the obligations imposed under Article 12(1)(b), Article 12(1)(d) requires states to protect the girl-child from all forms of abuse at school. Violence against women includes "physical, sexual, psychological, and economic harm".[456] Read with Article 12(1)(b) and (d)

[453] African Commission "General Comment 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (28 November 2011) para 4.
[454] Articles 2(1)(b)-(d) of the Maputo Protocol.
[455] See the text to parts 4 6 4 1 and 5 4 2.
[456] Article 1(j).

this increases support for the removal of content from the curriculum that promotes violence against women and undermines their equal rights. Protecting girls with non-heteronormative SOGIE from violence also means that states should address behaviour that excludes and dehumanises them. Importantly, in General Comment 2, the African Commission set out the obligation on states to provide "comprehensive information and education on human *sexuality*, reproduction and sexual and reproductive rights" [*own emphasis*].[457] It is suggested that the African Commission's reference to sexuality should be understood in terms of queer theory, which appreciates sexuality as a personal experience.[458] This is also in line with the approach adopted by the Human Rights Council, the ECtHR, and the IACtHR.[459] As a result, and with support from the ECSR's decisions in *Dojan* and *INTERIGHTS*, "education on human sexuality" should include not only information on heterosexuality but should also teach children about non-heteronormative SOGIE.[460]

Article 12(1)(e) further demands that states "integrate gender sensitisation and human rights education at all levels of education curricula". The African Commission has not expanded on what human rights education entails under the Maputo Protocol. In respect of the ACHPR, the African Commission has explained that it should foster respect for the fundamental rights and freedoms of others. Respect for the rights of others is integral to ensuring that these rights can become effective.[461] According to the Special Rapporteur on the right to education, human rights education provides the platform for addressing degrading and discriminatory ideas of women. Recognition of the inherent human dignity of all persons to be treated with respect and concern without discrimination is central hereto.[462] The CESCR adds that human rights education should reflect values of participation and inclusion. As such, education has the potential to address stigma against particular groups of individuals.[463] Against this backdrop, human rights education under the Maputo Protocol should, therefore, at least teach children of the rights enshrined under this instrument and elucidate state obligations. Considering the discussion undertaken here, it is clear that the Maputo Protocol, in fact, envisages a human rights-based approach in eliminating all forms of discrimination against women in education,

[457] African Commission "General Comment 2" para 51.
[458] See the text to part 2 4 1.
[459] See the text to parts 4 2 3, 5 3 2 2, and 6 4 2 2.
[460] See the text to parts 5 3 3 and 5 4 3.
[461] See the text to part 7 3 3 2.
[462] See the text to part 4 2 4.
[463] See the text to part 4 4 3.

one that corresponds to the framework for human rights education set forth under international human rights law.

7 6 Concluding remarks: a teleological approach to the interpretation of the right to education of children with non-heteronormative SOGIE under the African regional human rights system

Denying any person their rights prevents them from living a dignified life through which they can contribute to the development of their communities. This goes against the very core of the ACHPR, the ACRWC and the Maputo Protocol. The African Commission and the ACERWC have indicated that legal recognition is integral to human dignity. Relying on the ICCPR, the ECHR, the ESC, and the ACHR, it has been suggested that human dignity under the ACHPR, ACRWC, and the Maputo Protocol not only requires legal recognition, but also legal *gender* recognition.[464] This is because legal recognition of any kind affects the individual's ability to enjoy the rights to which they are entitled. Although no mention is made to children with non-heteronormative SOGIE in the context of the right to human dignity (or any other rights under the ACRWC), the entitlement of all children to respect for their inherent human dignity without discrimination of any kind is a well-established principle of international law.

To date, there is, in general, little support for the rights of persons with non-heteronormative SOGIE from the AU. However, the African Commission has nonetheless illustrated its willingness to recognise the rights of persons with non-heteronormative SOGIE based on each person's inherent human dignity and the general prohibition on discrimination. The ACERWC presents a similar position, adding strong protection for the rights of the child, requiring that their best interests shall be the primary consideration in matters concerning them.

It is suggested that the lack of an explicit decision dealing specifically with the rights of persons with non-heteronormative SOGIE does not mean that these persons are not entitled to the rights enshrined under the ACHPR, ACRWC, or the Maputo Protocol. This is based on two related points that formed the core of this chapter: (i) that the African Court, the African Commission, and the ACERWC have started challenging the religious, moral, and cultural norms that undermine the rights of any person who does not promote African masculinity; and (ii) that international, European, and inter-American jurisprudence on the right to non-discrimination, in particular, supports the global development towards the protection of persons with non-heteronormative SOGIE.

[464] See the text to parts 4 3 2 2, 5 3 1, 5 4 1, and 6 4 2 2.

As to the first point, it has been shown that given the object and purpose of the African human rights treaties – to protect the rights of all persons without discrimination – whether concerning all persons under the ACHPR, children under the ACRWC, or women under the Maputo Protocol – religious, moral, or cultural practices that limit human rights can only be deemed as promoting positive African values, and thus protected, if they do not render the rights protected as illusory and also comply with internationally recognised human rights principles. Arguments of African values and the supposed un-African-ness of non-heteronormative SOGIE should be weighed up against universalist notions of human rights, cultural developments, as well as the provision made for the elimination of harmful practices and addressing gender stereotypes that promotes the subjugation of women. As such, it is unlikely that the AU states can legally uphold their arguments against the recognition of the rights of persons with non-heteronormative SOGIE under the ACHPR, ACRWC, and the Maputo Protocol.

As to the second point, non-heteronormative SOGIE have been established as prohibited grounds of discrimination under international, European, and inter-American human rights treaties. The rights under the international, European, and inter-American treaties discussed above have been interpreted in the same manner, although the developments did not all occur at the same time. Under international and inter-American treaties, this development occurred in relation to the right to non-discrimination.[465] In comparison, the ECtHR developed the right of persons with non-heteronormative SOGIE through the right to respect to private life, enshrined under Article 8 of the ECHR.[466] Adopting a broad understanding of private life, the ECtHR referred to sexual life as a most intimate aspect of private life and tolerance as a hallmark of democratic societies, using these values to protect the rights of persons with non-heteronormative SOGIE.

The ACHPR does not enshrine an explicit right to privacy. Murray and Viljoen argue that the right to privacy is implicit to the right to human dignity.[467] As a result, it is possible to recommend that the African Commission and the African Court follow the approach of the ECtHR in its development of the protection of the rights of persons with non-heteronormative SOGIE. However, Rudman argues that using the right to privacy to protect the rights of persons with non-heteronormative SOGIE under the ACHPR is a "double-edged sword".[468] This is

[465] See the text to parts 4 4 3, 6 3 2, and 6 4 2 2.
[466] See the text to part 5 3 2.
[467] Murray and Viljoen (2007) *HRQ* 90. See also, Rudman (2015) *AHRLJ* 18.
[468] Rudman (2015) *AHRLJ* 18.

because although it would be the "path of least resistance" to get states to accept non-heteronormative SOGIE, the use of privacy would mean that non-heteronormative SOGIE are in fact not openly accepted, but that it is ignored as long as it remains hidden. Thus, "the use of privacy would leave the stigma completely untouched and the state without any positive obligations.[469] In light of this, the ECtHR's decisions arguably offer valuable insight into using the rights to human dignity and non-discrimination read with the right to privacy, it should not be used to promote a privacy-based argument under the ACHPR, ACRWC, or the Maputo Protocol. Rather, the focus should be on the rights to human dignity and non-discrimination, as was the approach under the international and inter-American treaties discussed. Considering the establishment of universal human rights over cultural relativism, it is expected that, in time, the African Commission and the ACERWC will explicitly recognise the existing protection of the rights of persons with non-heteronormative SOGIE under the ACHPR, ACRWC, and the Maputo Protocol.

This chapter also explored the right to education of children in general. It was found that similar to the international and regional instruments discussed, the ACHPR, ACRWC, and the Maputo Protocol provides a comprehensive and watertight right to education. In this regard, it is clear that *all* children are entitled to the right to education and that states have to ensure equal access to and enjoyment of the right to education without discrimination. Thus, the right to education goes beyond mere access to education. Considering the right to human dignity, the child's best interest, their right to development, as well as their right to protection from harm, it was illustrated that the state's obligations in respect of the right to education do not leave room for discrimination based on non-heteronormative SOGIE. There is a clear duty to promote fundamental rights and freedoms through human rights education, to ensure that children do not suffer marginalisation in their enjoyment of this right, as well as to encourage children to complete their education. As such, the right to human dignity, non-discrimination, and the best interests of the child read with the right to education places an obligation on states to ensure the right to education of children with non-heteronormative SOGIE under the ACHPR, the ACRWC, and the Maputo Protocol.

[469] 18.

8 Conclusions

8 1 Introduction

At the centre of this dissertation is the denial of a fundamental right based on personal attributes. This denial is due to preconceptions regarding what people should be, the behaviours they should adopt, and the romantic relationships that they should form. The question that the dissertation sought to address is part of a larger issue of how heteronormative conceptions of SOGIE shape the law and its institutions, excluding persons who do not fit this conceptual approach. Because the research concerns the right to education of children, a further challenge that arises is that of protecting children from all harm, to ensure their full development. However, because heteronormativity influences all aspects of life, protecting children from harm has also been viewed in this context. This has led to the exclusion of children with non-heteronormative SOGIE in conversations regarding children's protection. As a result, children with non-heteronormative SOGIE are denied the enjoyment of numerous rights, including the right to education, which forms the focus of the dissertation.

The ACHPR, the ACRWC, and the Maputo Protocol protect the rights of persons without distinction. Whereas the ACHPR applies to all persons, the ACRWC and the Maputo Protocol apply to all children and all women, respectively. All three instruments explicitly enshrine the rights to human dignity, equality, non-discrimination and education. The ACRWC further guarantees the right of the child to have their best interests as the primary consideration in all matters concerning them.

Throughout this dissertation, it was argued that all children are entitled to the right to education. When read together with the rights to dignity, equality and non-discrimination, states are obligated to protect and promote the right to education of vulnerable groups. Against the backdrop of the vulnerability of children with non-heteronormative SOGIE to discrimination in the context of education, it was established that states must apply specific special measures to ensure that these children have an equal right to education as children with heteronormative SOGIE. In support thereof, the right to education under international, European, and inter-American human rights treaties was considered, to determine to what end these instruments can guide the interpretation of the right to education under the ACHPR, the ACRWC and the Maputo Protocol.

The rights of persons with non-heteronormative SOGIE have not been directly confirmed in the jurisprudence of the African Commission and the African Court. However, the African Commission has indicated its support for the recognition of the rights of persons with non-

heteronormative SOGIE under the established principles of the ACHPR and the Maputo Protocol. From within the AU, as discussed in part 7 3 2 2, some states argue against the recognition of the rights of persons with non-heteronormative SOGIE based on the perception that these identities conflicts with African cultural values and, therefore, are un-African. Considering states' obligations under international human rights law and utilising a teleological approach to treaty interpretation together with a queer theoretical lens, it was suggested throughout this research that these arguments contradict the object and purpose of the ACHPR, the ACRWC, and the Maputo Protocol to protect the rights of all persons without distinction. As a result, states must eliminate harmful practices and stereotypes that promote the exclusion of persons with non-heteronormative SOGIE through the re-socialisation of its people through the law and its institutions.

8 2 Findings

8 2 1 Value of a queer theoretical lens

Chapter 2 elaborated on queer theory and QLT to create an understanding of how the conflation of sex, gender, and sexual orientation has culminated in the establishment of heteronormativity as a site of violence, permeating all aspects of the lives of non-conforming individuals. Queer theory recognises the instability of sexual and gender identities, reconsidering the meaning of 'man' and 'woman' and the gendered behaviour attached thereto. Through its inclusion of diverse non-heteronormative SOGIE without elevating one above the other, queer theory provided the needed framework within which to question heteronormativity in an educational setting. Together with queer theory, this research also utilised QLT to interrogate how heteronormativity has shaped the interpretation and application of the law. In this regard, QLT invited the consideration of the lived realities of sexual and gender minorities in the development and formulation of the law. QLT furthermore played an important role in analysing and queering the case law.

Considering the jurisprudence of the international, European, and inter-American human rights bodies, the research essentially illustrated that queer theory and QLT are increasingly applied by courts and human rights bodies to protect the rights of persons with non-heteronormative SOGIE. For example, the Independent Expert understands discrimination based on non-heteronormative SOGIE to be a result of non-conformance with established gender norms. The jurisprudence of the HRC, the ECtHR, the ECSR, and the IACtHR has furthermore confirmed that moral considerations and traditional values that prescribe

acceptable romantic couplings and expected behaviour based on sex cannot be justified because of the impact on the individual's human dignity and ability to other enjoy fundamental human rights.

These references indicate that these bodies recognise the existence of the conflation of sex, gender, and sexual orientation and how the conflation has been used to prescribe "acceptable" SOGIE through the establishment of heteronormativity. It further indicates an understanding that non-compliance with the behavioural expectations attached to the conflation results in sociocultural exclusion. As a result, these bodies have decided that states should adopt special measures to ensure that persons with non-heteronormative SOGIE are protected against discrimination and guaranteed equal rights.

Under African human rights law, the African Commission and, to a lesser extent, the ACERWC, have also incorporated tenets of queer theory and QLT in its work. In this regard, the African Commission has illustrated a broad understanding of gender, explaining that it is a personal experience that can change from birth because it is unrelated to biological sex. Furthermore, the African Commission is increasingly recognising how preconceptions of masculinity and femininity exacerbate violence and discrimination, ultimately undermining the potential for individuals to enjoy the rights that they are entitled to.

Of particular interest to this research is the embodiment of a queer theoretical approach in the YP and YP+10 in suggesting how existing fundamental human rights should be applied to protect persons with non-heteronormative SOGIE and to ensure their equal rights. Even though statements of the international and European human rights bodies correspond with the YP and the YP+10, these instruments have nonetheless seen limited application in these systems. Contrary to the trend in the international and European systems thus far, the YP and YP+10 have been of immense value to the IACtHR in establishing the rights of persons with non-heteronormative SOGIE under the ACHR.

8 2 2 A teleological approach to the interpretation of treaties

Chapter 3 introduced a teleological approach to the interpretation of treaties, as set forth under the Vienna Convention. Although Article 31 contains elements of the 'intention of the parties' and the textual approach, it favours a teleological one. In terms of this approach, treaties should be interpreted in line with what would best promote its object and purpose, viewed in its current context. The relevance and value of a teleological approach for purposes of this research were shown to be the facilitation of an interpretation of the international, European, inter-American,

and African human rights treaties that go beyond what is included in the text that is, beyond a mere textual approach. In this regard, the Preamble of these treaties and evidence of changing societal values to promote the rights of persons with non-heteronormative SOGIE was considered. Moreover, in respect of the right to education, reference was made to how general comments, resolutions, and joint declarations have given detailed content to state obligations, especially regarding the equal treatment of learners.

Under chapter 3, it was also illustrated that the universality of human rights has great bearing on the object and purpose of all human rights. The UDHR represents the foundation of international human rights norms, confirming the entitlement of all persons to human rights without distinction by virtue of being human. The rights guaranteed under the UDHR are reiterated under all the international and regional human rights treaties discussed in this dissertation, albeit different in phrasing or detail. In this way, the universality of human rights was established. The wide ratification of these international and regional treaties further confirmed this argument.

The universality of human rights was discussed in opposition to cultural relativism. In its most absolutist form, cultural relativism demands respect for cultural differences to the extent that no understanding of human rights can stand in the face of cultural values or traditions. However, as shown in this research, culture is malleable and changes across time and space. This is not to say that there is no room for cultural considerations in the interpretation of fundamental human rights. Rather, as established in this research, cultural considerations cannot outweigh fundamental human rights.

The international, European, inter-American and African jurisprudence discussed, illustrate that cultural and religious traditions should be respected as part of celebrating difference across the world. However, under each of these systems, it has been established that the moral, cultural and religious traditions or considerations referred to here are *positive* ones, that is, those that are in line with agreed-upon human rights norms and do not undermine human rights. The acceptance of positive culture requires the eradication of stereotypes and practices that are harmful to the full realisation of human rights and perpetuate social exclusion. Harmful practices are defined in relation to gender-based violence and discrimination. It is the heteronormative conceptions of masculine and feminine behaviours that encourage and uphold harmful practices.

States are obligated to take steps to ensure the rights of all persons without distinction. The violence and discrimination perpetrated against persons with non-heteronormative SOGIE prevent them from accessing their equal rights and benefitting therefrom. Their criminalisation

and rejection are a result of non-conformance with expected norms of behaviour and expression. Thus, ensuring the universal human rights of all persons requires states to address cultural relativist arguments aimed at undermining the rights of persons with non-heteronormative SOGIE through re-socialisation. At the core of this project of re-socialisation lies the need to unpack heteronormativity as a site of violence and how it has come to permeate all aspects of our existence, including the formulation and interpretation of the law.

8 2 3 Arguments for protecting the rights of persons with non-heteronormative SOGIE

8 2 3 1 Human dignity

Whether or not human dignity is explicitly referred to in the Preambles or substantive provisions of the international or regional human rights treaties, it has been established, together with equality and non-discrimination, as universal principles of international law. As such, it underscores all human rights. The rights to human dignity, equality, and non-discrimination have been crucial to the development of the rights of persons with non-heteronormative SOGIE under the international, European, inter-American, and African human rights systems. Significantly, as shown in this research, despite the differences in the formulation of these rights, the right to human dignity, equality, and non-discrimination have been given similar interpretations by the international and regional human rights bodies.

What comes across in international, European, inter-American, and African human rights jurisprudence is that human dignity is integral to self-worth, development, and the enjoyment of fundamental rights. As a result, all forms of degrading treatment are prohibited. All treaty bodies have further confirmed that human dignity requires that people be valued, and their rights respected based on the mere fact of being human. The failure to recognise the inherent dignity of individuals, therefore, prevents them from enjoying the rights to which they are entitled.

The ICCPR, ADRDM, ACHR, and the ACHPR recognises that the right to life includes the right to a dignified life. This means that states should ensure a certain level of well-being for individuals to enable their full development. The IACmHR's decision in *Giraldo* is of particular significance here, drawing attention to the sacredness of interpersonal relationships, whether heteronormative or non-heteronormative and the importance of respect for it to a dignified life. The IACmHR further explained that the use of stigmatising language in addressing persons with non-heteronormative SOGIE shows aversion towards them, thereby violating their human dignity. As confirmed by the IACtHR in *Atala*, human dignity is also

connected to the individual's right to experience and express their SOGIE as an integral part of the self. Similarly, although not stated in the context of persons with non-heteronormative SOGIE, both the African Commission and the ACERWC have pronounced that humiliating language and discrimination undermines the individual's self-worth, ultimately preventing them from pursuing their life goals.

Degrading treatment has been interpreted broadly under the UDHR, CRC, ECHR, ACHR, as well as the ACHPR, ACRWC, and the Maputo Protocol. The prohibition of degrading treatment prohibits all forms of violence, including corporal punishment, humiliation, sexual or gender-based violence, and harmful practices inimical to the recognition of fundamental rights. The ECtHR has explicitly included respect for the individual's non-heteronormative SOGIE under the right to human dignity. In *Goodwin*, it was held that the right to human dignity read with the right to respect for private life demands legal gender recognition because the failure to do so would amount to continuous undignified treatment. In this regard, the rights of persons with non-binary gender identities and gender expressions cannot be rejected based on majority morality. Legal gender recognition is, ultimately, tied to the individual's ability to enjoy their fundamental rights. As such, requiring that steps be taken to enable them to do so is a restatement of the notion that all persons are entitled to equal rights because of their inherent human dignity.

The IACtHR adopted a similar approach in its advisory opinion on the *Gender Identity, and Equality and Non-discrimination of Same-sex Couples*, stating that the right to a dignified life means that individuals have a right to choose and live their identities. Because legal recognition is central to the ability to lead a dignified life, the IACtHR also confirmed that the right to legal recognition requires legal gender recognition. In *Nubian Community* and *IHRDA v Kenya*, the African Commission and the ACERWC established the relationship between human dignity, legal recognition, and the enjoyment of human rights. It was illustrated in parts 7 3 1 and 7 4 2 that relying on the decisions in *Goodwin*, *Transgender Europe*, and the advisory opinion on the *Gender Identity, and Equality and Non-discrimination of Same-sex Couples*, the right to human dignity facilitates legal gender recognition under the ACHPR and the ACERWC. Ultimately, denying legal gender recognition to persons with non-binary gender identities and gender expressions violate their inherent human dignity and compromise their ability to enjoy other rights.

The prevention of degrading treatment and elimination of harmful practices against women are central to CEDAW, the Convention of Belém do Pará, and the Maputo Protocol. Harmful practices are defined in relation to the dignity and development of women. Under CEDAW,

harmful practices refer to persistent practices that undermine women's ability to fully enjoy the right that they are entitled to, like other persons. Here, the CEDAW Committee has specifically referred to the undermining impact of gender-based discrimination on the human dignity of women with non-heteronormative SOGIE. Similarly, in the Convention of Belém do Pará, violence against women is defined as an affront to human dignity. The Maputo Protocol has gone further than CEDAW and the Convention of Belém do Pará, providing that human dignity includes the freedom to make personal decisions without interference. In their decision-making, women can choose whether to take into consideration traditional, cultural, or religious practices or values or not. As such, states cannot use arguments of cultural considerations to undermine human dignity. This is further supported by the Preamble of the Maputo Protocol, which provides that African values are only deemed positive if it complies with equality, freedom, and dignity as international human rights standards.

In this context, the question as to how negative conceptions of SOGIE inform the current interpretation of these instruments also becomes relevant. Here, attention is drawn to how conceptions of SOGIE in terms of traditional and religious norms have been used by the Executive Council to undermine the rights of persons with non-heteronormative SOGIE under African human rights law. This has been most evident in the removal of CAL's observer status because its mandate, according to the Executive Council, contradicts fundamental African values. In light hereof, the prohibition of discrimination should be considered.

8 2 3 2 Non-discrimination

The international, European, inter-American, and African human rights bodies have all implicitly unpacked heteronormativity as a site of violence in the development of non-heteronormative SOGIE as prohibited grounds of discrimination. As a point of departure, it should be reiterated that all persons are entitled to human rights without distinction. Discrimination refers to when persons similarly situated are treated differently or when persons differently situated are treated the same. The human rights treaties discussed prohibit discrimination based on numerous grounds, including an open-ended reference to "other status". The relevant human rights bodies understand this as meaning that the drafters intended that the prohibited grounds of discrimination could be expanded upon to reflect legal and social developments.

Under the UDHR, the Human Rights Council established that support for prohibiting discrimination based on non-heteronormative SOGIE stems from founding human rights

principles: that human rights are universal, that all persons are free and equal in dignity and rights, and that as such, all persons deserve equal protection and concern. Importantly, the Independent Expert recognised, as indicated under 8 2 1, that persons with non-heteronormative SOGIE are vulnerable to discrimination for not conforming to expected behaviours and expressions. Thus, they are prevented from the full recognition and enjoyment of their rights.

The HRC has made the most significant pronouncement towards protecting the rights of persons with non-heteronormative SOGIE under international human rights law. Having established that all persons are equally entitled to the rights guaranteed under the international human rights instruments discussed, it is important to reiterate that rights may only be limited if it is reasonable and justifiable. This is determined by weighing up the extent and impact of the limitation with the aim that the restriction seeks to achieve.

In *Toonen*, the HRC held that the moral considerations in favour of criminalising sodomy do not outweigh the right to privacy of individuals with non-heteronormative sexual orientations. Importantly, in *Fedotova*, the HRC established that limitations based on morality should be viewed in the context of the universality of human rights and the right not to be discriminated against. Here, it was decided that the state cannot limit the right to freedom of expression of persons with non-heteronormative sexual orientations based on the perceived need of the state to protect minors from being exposed to non-heteronormative sexual orientations. The ICCPR has further established that laws discriminating against persons in their equal access to the enjoyment of their rights should be revised to ensure equal enjoyment of all rights. The ICCPR's jurisprudence illustrates that rights and freedoms should be interpreted broadly and restrictions narrowly. Through this approach, the HRC has established non-heteronormative SOGIE as prohibited grounds of discrimination under Article 26 of the ICCPR

Although less prominent than the ICCPR, the CESCR has listed discrimination based on non-heteronormative SOGIE as prohibited under "other status" in its general comments. Under CEDAW, non-heteronormative SOGIE has been recognised as grounds that exacerbate discrimination. The CEDAW Committee has also expressed concern over discrimination based on these grounds. Similarly, the CRC Committee has requested states to address stigmatisation, violence, and discrimination based on non-heteronormative SOGIE in all contexts. Thus, although not explicitly found in the jurisprudence of the CEDAW and CRC Committees, discrimination based on non-heteronormative SOGIE is prohibited under the CEDAW and CRC.

Under European human rights law, the ECtHR established the rights of persons with non-heteronormative SOGIE through reading the right to respect for private life with the prohibition of discrimination. Comparably to the HRC, the ECtHR holds that moral considerations or negative social attitudes do not constitute legitimate justifications to limit the rights of persons based on their non-heteronormative SOGIE. Despite the application of the margin of appreciation doctrine, particularly weighty reasons will still have to be presented as justification for a restriction where a most intimate aspect of private life is involved. Of significance is the ECtHR's recognition of private life as the right to establish relationships with other individuals, to personal development, and to express themselves in public and in private. Although the right of persons with non-heteronormative SOGIE was developed under the right to respect for private life, the recognition that individuals should be allowed to express themselves in public illustrates the public element of the right to respect for private life. As such, position under the ECHR is that non-heteronormative SOGIE cannot be restricted to the private sphere.

The prohibition of discrimination is less pronounced under the ESC and ESC(r) than under the ECHR. The ESC does not enshrine non-discrimination in a substantive provision. However, discrimination is prohibited under the Preamble. The ECSR in *GSEE v Greece* explained that non-discrimination is an open-ended list, and that, as a result, anti-discrimination legislation should prohibit discrimination based on sexual orientation in the workplace. In *INTERIGHTS v Croatia*, the ECSR further found a violation of the right to comprehensive sexual and reproductive health education based on the degrading depictions of non-heteronormative sexual orientations in educational materials. Despite not stating that sexual orientation was the prohibited ground of discrimination involved, it is argued that *INTERIGHTS v Croatia*, together with *GSEE v Greece*, establish sexual orientation as a prohibited ground of discrimination under the ESC.

The ESC(r) explicitly prohibit discrimination under Article E in identical terms as Article 14 of the ECHR. Unlike under the ECHR, non-heteronormative SOGIE have not been established as prohibited grounds of discrimination under the ESC(r) in the decisions of the ECSR. However, the ECSR has expressed concern over discrimination based on these grounds and requested information from states on the measures taken to eliminate such discrimination. In light hereof, the ESC(r) favours an interpretation of non-discrimination that prohibits discrimination based on non-heteronormative SOGIE.

As indicated above, inter-American human rights law provides the most comprehensive and up-to-date protection for the rights of persons with non-heteronormative SOGIE under

international law, as developed by the IACtHR and the IACmHR under the ACHR. In establishing sexual orientation as a prohibited ground of discrimination under Article 1(1), the IACtHR in *Atala* referred to the importance of interpreting the ACHR in a manner that reflects changing times. The IACtHR held that, given the historical and structural discrimination that sexual minorities have suffered and continue to suffer, an alleged lack of consensus as to the recognition of persons with non-heteronormative sexual orientation cannot be accepted as a valid argument for restricting their rights. Drawing from the ECtHR, the IACtHR explained that the right to non-discrimination extends to the person's expression of their sexual orientation. This means that individuals should be allowed to establish and maintain relationships with people of the same sex. Furthermore, in *Freire*, the IACtHR established that negative moral perceptions of non-heteronormative sexual orientations are not a legitimate justification for discrimination. Both *Freire* and *Duque* establish that states must ensure the equal rights of persons with non-heteronormative sexual orientations in all contexts.

The IACtHR's advisory opinion on *Gender Identity and Equality and Non-discrimination of Same-sex Couples* is ground-breaking for clarifying states' obligations in respect of recognising, protecting, and ensuring the rights of persons with non-heteronormative SOGIE. Importantly, the IACtHR explained that the state's obligation to legally recognise an individual's gender stems from the individual's experience of the self. Because legal gender recognition has implications for the enjoyment of fundamental rights, states cannot deny this because of moral prejudice against persons who do not conform to the behavioural norms of their societies. In this advisory opinion, the IACtHR further confirmed that patrimonial rights derive from same-sex relationships because there is no exclusive definition of what families should look like. Rejecting the right to marry of persons with non-heteronormative SOGIE based on philosophical, religious, or procreation-related reasons is unacceptable because it renders the right to equal treatment arbitrary. Moreover, there can be no legitimate purpose for such a restriction considering the purpose of the ACHR, to protect the human rights of all persons.

In comparison to the international, European, and inter-American human rights systems, the African human rights bodies have not yet established non-heteronormative SOGIE as prohibited grounds of discrimination. However, in its interpretation of the rights to equality and non-discrimination under the ACHPR, the African Commission and the African Court has drawn extensively from the international, European, and inter-American human rights bodies. For example, in its definition of discrimination, the African Commission in *Zimbabwe Human Rights NGO Forum* relied on General Comment 18 of the HRC. Furthermore, in establishing

the test for determining discrimination under Article 2, the African Commission in *Kenneth Good* referred to the HRC, the ECtHR, and the IACtHR. Considering this, the interpretation of the right to non-discrimination has been similar to that under the international and regional human rights bodies.

Article 2 prohibits discrimination based on numerous listed grounds, including an open-ended reference to "other status". Chapter 7 set out the arguments for including non-heteronormative SOGIE under "other status". The point of departure is that all persons are entitled to the rights enshrined under the ACHPR without distinction. Article 27(2) provides the only legitimate reasons for restricting a right enshrined under the ACHPR. Although not intended to be a limitations clause, it has been used as such by the African Court and the African Commission. Importantly, Article 27(2) allows limitations based on morality, which, in turn, is related to, and determined, by popular will, culture and religion.

Considering the discussions in parts 7 3 2, 7 4 2, and 7 5 2 the African Commission and the ACERWC have adopted a clear position on the promotion of *positive* African values; those that are consistent with international human rights standards and inspire mutual care and support. As such, religious, moral, or cultural practices that undermine human rights or render it illusory cannot be deemed as promoting positive African values. To this end, African values, and the supposed un-African-ness of non-heteronormative SOGIE are weighed up against universalist notions of human rights and cultural developments. The obligation to eliminate harmful practices and address gender stereotypes that promote the subjugation of women and support systems of patriarchy is essential hereto. In this regard, the African Commission and the ACERWC illustrate a constructionist understanding of gender, how heteronormativity facilitates the infringement of fundamental rights, and how this can facilitate the continued existence of harmful practices under the guise of culture.

It was illustrated that religious, moral, or cultural practices that infringe on fundamental rights can only be protected if it is considered to reflect positive African values. Importantly, these practices may not render the rights protected under the ACHPR, the ACRWC, or the Maputo Protocol as illusory. In light hereof, it is suggested that a universal conception of human rights outweigh arguments of cultural absolutism that favour the oppression of beliefs that do not promote African masculinities. As such, AU states cannot *legally* uphold their arguments against the recognition of the rights of persons with non-heteronormative SOGIE under the ACHPR, ACRWC, and the Maputo Protocol.

Relying on obiter statements, concluding observations, interpretive guidelines, and resolutions, it is argued that the African Commission has established support for the protection

of the rights of persons with non-heteronormative SOGIE under the ACHPR. Similar to the international, European, and inter-American human rights bodies, the African Commission has expressed concern over the violence and discrimination perpetrated against persons with non-heteronormative SOGIE, stating that popular will does not constitute a legitimate justification for the non-recognition of the rights of these individuals. The African Commission has also recognised that persons with non-heteronormative SOGIE face significant challenges in their enjoyment of economic, social, and cultural rights as a result of continued non-acceptance and discrimination. As such, states have heightened obligations to adopt special measures aimed at ensuring their equal rights and must enact legislation to this end.

The wording of the prohibition of discrimination under the ACRWC is similar to the ACHPR. As such, the test applied to determine discrimination is the same. The ACERWC requires states to take special measures to eliminate discrimination against vulnerable groups of children who face challenges in their equal enjoyment of their human rights. For example, in *IHRDA v Kenya*, the ACERWC held that there are no legitimate reasons for denying legal recognition to children of Nubian descent, thereby preventing their access to equal rights. Significantly, the ACERWC has interpreted sexual violence as gender-based discrimination because it is caused by beliefs and attitudes regarding men's dominance, causing and maintaining gender-based violence. Through this, the ACERWC provides a framework to incorporate non-heteronormative SOGIE under the ACRWC. Correspondingly, the Maputo Protocol aims to eliminate all forms of discrimination against women. The discussion on the Maputo Protocol concluded that 'women' is inclusive of any person who identifies as a woman. Of significance, in addressing discrimination against women, is the obligation to eliminate harmful practices. In this regard, the African Court in *APDF* followed a similar approach to the ACHPR, holding that culture, morals, and religion cannot outweigh international human rights standards. Like under the ACRWC, harmful practices include those that promote heteronormativity as a site of violence.

8 2 4 A comprehensive right to education under the ACHPR, the ACRWC, and the Maputo Protocol

Given the experiences of children with non-heteronormative SOGIE set out under 1 1 and the failure of the African treaty bodies to explicitly pronounce on the right to education of children with non-heteronormative SOGIE, the assumption set out under 1 2 that the ACHPR, the ACRWC, and the Maputo Protocol in their current interpretations do not afford children with

non-heteronormative SOGIE an equal right to education as it does to children with heteronormative SOGIE was confirmed.

The second assumption was that the rights to human dignity, non-discrimination, equal protection of the law, and the best interests principle can be purposefully interpreted to provide a framework for the protection of SOGIE rights in education. Under 8 4 3, it was established that a teleological interpretation of the rights to human dignity, non-discrimination, and equality protects the right of all persons from discrimination based on their non-heteronormative SOGIE. Because the rights to human dignity, non-discrimination, and equality inform the interpretation of all other rights, it necessarily also applies to the right to education.

The essence of the right to education under the international, European, and inter-American human rights treaties is that all persons have the right to education. The UDHR, ICESCR, CRC, and CEDAW enshrine an explicit right to education. The ECHR, the E SC(r), the ADRDM, the Protocol of San Salvador, and the Convention of Belém do Pará also guarantee the right to education. In comparison, the ESC(r) contains an implicit right to education. Although the formulation of the right is different under these instruments, their interpretations, as the research has shown, are similar.

The right to education under the ACHR is unique. Whereas the ADRDM enshrine an explicit right to education, the right to education is protected under Article 26 of the ACHR, providing a general right to the progressive realisation of economic, social, and cultural rights. Neither the IACmHR nor the IACtHR has yet interpreted the right to education in light of Article 26. However, it has protected the right to education through reading it with the child's right to life and special protection. In this regard, extensive references have been made to the CRC. As a result, the expectation is that the right to education under Article 26 will be interpreted similarly to the CRC.

Across these instruments, the right to education has been interpreted as accruing to all individuals. As a result, no one may be discriminated against in their enjoyment of this right. Considering that discrimination based on non-heteronormative SOGIE has been established as a prohibited ground of discrimination under these systems, all persons are entitled to the right to education without discrimination based on their non-heteronormative SOGIE. However, it is not enough that the right to education is recognised. The right to education should also be effective to ensure that all children can benefit from the opportunities that the right provides.

To this end, the aims of education guide state obligations in respect of addressing discrimination against children with non-heteronormative SOGIE in schools. This includes the introduction of human rights education at all levels of education, as well as comprehensive and

age-appropriate diverse sexual and reproductive education. In this context, reference has also been made to the best interests principle. Ultimately, education should be child-centred, child-friendly and empowering. Because children spend so much time in school, the environment is vital to ensuring that *all* children can equally benefit from the right to education.

Similar to the international, European, and inter-American treaties discussed, the ACHPR, ACRWC, and the Maputo Protocol provides a comprehensive right to education. All children are entitled to the right to education. States, therefore, must ensure equal access to, and enjoyment of, the right to education without discrimination. The right to education goes further than requiring states to only provide access to education. Considering the right to human dignity, the child's best interests, their right to development, as well as their right to protection from harm, chapter 7 illustrated that states' obligations in respect of the right to education do not leave room for discrimination based on non-heteronormative SOGIE. In this regard, states must promote fundamental rights and freedoms through human rights education, as well as to ensure that children do not suffer marginalisation in their enjoyment of education. Importantly, children should be encouraged to complete their education. Considering the discussion in part 1 1, states must take steps to ensure that children with non-heteronormative SOGIE are not subjected to physical, verbal, or sexual violence by their peers or their teachers. *Mphela v Manamela and Limpopo Department of Education* illustrate the consequences of unchecked discrimination and victimisation in schools. Learners who feel threatened and rejected by their school environment are more likely to abandon their education. In light hereof, the rights to human dignity, non-discrimination, and the best interests of the child read with the right to education place an obligation on states to ensure the right to education of children with non-heteronormative SOGIE under the ACHPR, the ACRWC, and the Maputo Protocol.

In the interpretation of the rights to education under these instruments, specific guidance can be taken from the explicit references made by the international and European human rights bodies to the right to education of children with non-heteronormative SOGIE. For example, the Human Rights Council drew attention that children are often targets of violence and harassment based on their non-heteronormative SOGIE, which includes being refused admission to schools or being expelled. The Independent Expert has further explained that a lack of awareness of non-heteronormative SOGIE further exacerbate stigma and aggravates violence and harassment. Addressing this requires that educational materials be revised to include non-heteronormative SOGIE in the curriculum, in particular, in sexual education. Similar pronouncements have been made by the CESCR, the CEDAW Committee and the CRC Committee.

Under the ECHR, the ECtHR in *Dojan* explicitly referred to the role of sexual education in encouraging tolerance amongst individuals regardless of their non-heteronormative SOGIE. The ECSR's decision in *INTERIGHTS v Croatia* provides the most significant guidelines on ensuring the right to education of children with non-heteronormative SOGIE under the ESC and the ESC(r). Here, the ECSR explained that sexual health education should cover the spectrum of heteronormative and non-heteronormative SOGIE to provide for each child's SOGIE. Moreover, states must ensure that the curriculum does not portray persons with non-heteronormative SOGIE in a discriminatory manner.

8 3 Value of research

The research is valuable for setting forth and combining the current interpretation of the rights to human dignity, equality and non-discrimination, the best interests of the child principle, and the right to education under international and regional human rights law. It presents a comprehensive analysis of these rights under the international and regional human rights instruments, importantly elucidating how the systems draw from one another in the interpretation of these rights.

The research specifically applied these rights to children with non-heteronormative SOGIE. In this context, the research illustrated how the right to non-discrimination has been developed under international, European, and inter-American human rights law to include non-heteronormative SOGIE under the prohibition of discrimination based on "other status".

In particular, the research is of value for illustrating how queer theory and queer legal theory have been used by international and regional human rights bodies to unpack how heteronormative conceptions of SOGIE have influenced the formulation and interpretation of the law. The jurisprudence was discussed in light of how laws that facilitate discrimination against persons based on their non-heteronormative SOGIE culminate in a rejection of fundamental rights. Importantly, the research considered how the international and regional human rights bodies have interpreted treaty provisions to promote legal reform in favour of protecting the rights of persons with non-heteronormative SOGIE.

Utilising a comparative perspective together with a universal conception of human rights, the research is also valuable for setting forth how the international, European, and inter-American human rights treaties have guided the interpretation of the right to human dignity, equality, non-discrimination, and education under the ACHPR, the ACRWC, and the Maputo Protocol.

The most significant contribution of this dissertation is with respect to the establishment of a comprehensive right to education under the ACHPR, the ACRWC, and the Maputo Protocol for children with non-heteronormative SOGIE on the African continent. In this regard, the main tenets of the right to education under these instruments were explored, focusing on how education relates to the development of African children to grow up to become active members of their communities. Importantly, it was shown that neither Article 27(2) of the ACHPR, nor the obligation to promote positive African values under the ACRWC and the Maputo Protocol can be used to justify the limitation of the rights of persons with non-heteronormative SOGIE.

8 4 Recommendations

The effective protection of the rights of persons with non-heteronormative SOGIE under African human rights law requires an explicit pronouncement that discrimination based on these grounds are prohibited under the ACHPR, the ACRWC, and the Maputo Protocol.

It suggested, first, that, in the interpretation of the rights enshrined under the ACHPR, the ACRWC, and the Maputo Protocol, reference should be had to the international, European, and inter-American human rights instruments discussed for its representation of how universal human rights norms are applied in different contexts. In particular, the interpretation of the rights to human dignity, non-discrimination, and equality under the international, European, and inter-American human rights treaties provides valuable guidance to how non-heteronormative SOGIE should be established as a prohibited ground of discrimination under "other status" in Article 2 of the ACHPR and Article 3 of the ACRWC. This is further supported by the already extensive reference made by the African Commission, African Court, and the ACERWC to the interpretation of these rights by the international, European, and inter-American human rights bodies.

Secondly, given the interpretation set forth of the rights to human dignity, equality, and non-discrimination under chapter 7, the rights of persons with non-heteronormative SOGIE are protected under the ACHPR, the ACRWC, and the Maputo Protocol. This is in line with the purpose and object of the African human rights treaties to protect the rights of all persons without distinction. Against this backdrop, it is recommended that should the African Commission, the African Court, or ACERWC have to decide on a matter concerning the rights of persons with non-heteronormative SOGIE, it must consider the arguments presented here. These arguments do not allow a conclusion other than that the African human rights treaties protect the rights of persons with non-heteronormative SOGIE.

Third, following on the discussion in part 7 3 2 2, the African Commission should also continue to promote the rights of persons with non-heteronormative SOGIE in its concluding observations, resolutions, recommendations, and other communications. However, in this context, the problem faced by the African Commission is pushback from, amongst others, the Executive Council, the Africa Group and individual states regarding the recognition of the rights of persons with non-heteronormative SOGIE. Nonetheless, the African Commission can maintain its independence through reliance on its mandate. It is tasked with considering complaints of alleged violations of the ACHPR, as well as to examine state reports and adopt corresponding resolutions aimed at promoting human rights in African states. Therefore, regardless of the resistance against the recognition of the rights of persons with non-heteronormative SOGIE, the African Commission must continue to promote and protect the rights of *all* persons.

Finally, states should be encouraged to reflect the comprehensive right to education established under the ACHPR, the ACRWC, and the Maputo Protocol in their legislation and policies. In this regard, human rights education should be included at all levels of the curriculum. Human rights education has been interpreted as requiring that children be taught the human rights principles enshrined under the African human rights instruments. Considering the discussion undertaken under chapter 7, great value is attached to human dignity and non-discrimination to the development of individuals to become active members of their communities. Thus, human rights education has an important role to play in facilitating tolerance and respect for the diverse peoples on the African continent, including persons with non-heteronormative SOGIE. Through this, education has the potential to address stigma and prejudice towards vulnerable groups, contributing to the effective implementation and realisation of human rights.

Related to human rights education is the obligation to remove derogatory and stereotypical depictions of persons with non-heteronormative SOGIE from educational materials. This includes replacing references that encourage the social exclusion of persons with non-heteronormative SOGIE with information that recognises heteronormative and non-heteronormative SOGIE without elevating one above the other. Derogatory and stereotypical depictions of persons with non-heteronormative SOGIE encourage violence and discrimination because it facilitates the continued existence of harmful practices, gender stereotypes, and patriarchal values, which rely on and uphold heteronormativity. Education, therefore, has an important role in re-socialising individuals to eliminate the conceptions that undermine the rights of persons with non-heteronormative SOGIE.

The right to education further requires the establishment of age-appropriate sexual education at all levels of the curriculum. Sexual health education should cover sexual and reproductive health, as well as teach children of all forms of sexual violence and its consequences. The purpose of sexual and reproductive health is to develop children's understanding of the biological and social aspects thereof, enabling them to make responsible decisions regarding sexual and reproductive behaviour. To this end, children should be taught of the wide spectrum of SOGIE without raising either heteronormative or non-heteronormative sexual and reproductive health or relationships above the other. Sexual health information should, therefore, not perpetuate prejudice or social exclusion. In this way, gender and sexist stereotypes can be challenged.

In providing for the right to equal access to education, states should furthermore take steps to ensure that children with non-heteronormative are not prevented from registering at schools where their identification documents do not correspond to their identified gender identities or gender expressions. This is important, as refusing these children to register will prevent them from accessing educational institutions, the most fundamental aspect of the right to education.

Finally, compliance with the recommendations provided here requires that policies be adopted to guide schools on how to best accommodate learners with non-heteronormative SOGIE. In this regard, the state should address issues such as bathroom use, school uniform, and gendered extra-curricular activities in consultation with communities. At the core of its considerations should be how best to ensure that each child can enjoy their right to education without discrimination to reach their full developmental potential in a manner that respects their inherent human dignity. Ultimately, states must take steps to accommodate children with non-heteronormative SOGIE to ensure their equal enjoyment of the right to education to children with heteronormative SOGIE.

8 5 Areas for further research

As has been pointed out throughout this research, there is limited information available on the experiences of children with non-heteronormative SOGIE in any context on the African continent, including education. As such, research on the experiences of children with non-heteronormative SOGIE in schools can facilitate a more comprehensive understanding of how discrimination and marginalisation against them infringe on their right to education and related rights.

This dissertation did not consider, to any extent, how the criminalisation of homosexual conduct in individual African states exacerbates the discrimination experienced by persons with non-heteronormative SOGIE. Further research into this area would be valuable for elucidating how criminalising legislation prevents children with non-heteronormative SOGIE from their equal right to education as children with heteronormative SOGIE. Related hereto, it would also be beneficial to explore the impact of harmful gender conceptions on criminalising legislation.

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